Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

No. 92-1112

In The

Supreme Court of the United States

October Term, 1992

PELE DEFENSE FUND,

Petitioner,

vs.

WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

STEVEN C. MOORE, Esq.
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

YUKLIN ALULI
415-C Uluniu Street
Kailua, Hawaii 96734
(808) 262-5900

Attorneys for Pele Defense Fund

PAUL F.N. LUCAS
ALAN T. MURAKAMI
Native Hawaiian Legal Corporation
1270 Queen Emma St.
Suite 1004
Honolulu, Hawaii 96813
(808) 521-2302

Of Counsel:
EMILY CALHOUN, ESQ.
Professor of Law
University of Colorado School of Law
Boulder, Colorado 80309
(303) 492-7592

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

131 pp

QUESTIONS PRESENTED

Whether a federal court dismissal of an action brought under 42 U.S.C. Section 1983 for want of jurisdiction under the Eleventh Amendment bars a plaintiff from bringing a second Section 1983 action in state court against different defendants, seeking different relief for different wrongs, but arising out of a breach of trust that was the subject of the first lawsuit.

Whether a Section 1983 action filed in Hawaii should be subject to the two-year statute of limitations for "recovery of compensation for damage or injury to persons or property," which has been construed to apply to claims for physical harm, or the six-year statute of limitations for "personal actions of any nature whatsoever not specifically covered by the laws of the State," which has been construed to cover miscellaneous personal injury actions.

Whether the accrual of a cause of action in a Section 1983 action against state officials and private defendants alleged to have breached continuing trust obligations imposed by Section 5(f) of the Hawaii Admissions Act is determined by federal rules or by the state rule adopted by the Hawaii Supreme Court.

PARTIES TO THE PROCEEDING

Petitioner is the Pele Defense Fund. Respondents are William Paty, in his capacity as Chairperson of the Board of Land and Natural Resources, State of Hawaii, Moses Kealoha, Douglas Ing, Leonard Zalopany, John Arisumi and Herbert Arata, in their capacity as members of the Board of Land and Natural Resources; The Estate of James Campbell, Deceased, Fred E. Trotter, W.H. McVay, P.R. Cassidy, and Herbert C. Cornuelle, in their fiduciary capacity as Trustees under the Will of James Campbell, Deceased; The True Geothermal Drilling Company, and Mid-Pacific Geothermal, Incorporated.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS A WRIT OF CERTIORARI SHOULD ISSUE	5
I.	5
II.	7
III.	9
IV.	10
V.	14
VI.	15
CONCLUSION	16
Appendix A - Opinion and Judgment of the Supreme Court of Hawaii	1a
Appendix B - Opinion of the Circuit Court of the Third Circuit for the State of Hawaii	59a
Appendix C - Statutes and Constitutional Provisions Involved	106a

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 6, 8

Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981) 11, 12

Costello v. United States, 365 U.S. 265 (1961) 7, 8

Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988) 4

Delaware v. Ricks, 449 U.S. 250 (1980) 15

Del Percio v. Thornsley, 877 F.2d 785 (9th Cir. 1989) 13

Federated Department Stores v. Moitie, 452 U.S. 394 (1981) 8

Felder v. Casey, 437 U.S. 131 (1988) 14

Hafer v. Melo, 502 U.S. ___, 112 S. Ct. 358 (1991) 9

Hall v. State, 7 Haw. 274, 756 P.2d 1048 (1988) 9

Higa v. Mirikitani, 55 Haw. 167, 517 P.2d 1 (1973) 11

Howlett v. Rose, 496 U.S. 356 (1990) 7

Hughes v. United States, 71 U.S. (4 Wall.) 232 (1866) 8

Lai v. City and County of Honolulu, 749 F.2d 588 (9th Cir. 1984) 12

McKnett v. St. Louis & San Francisco Ry. Co., 292 U.S. 230 (1934) 7, 13

Martin v. Wilks, 490 U.S. 755 (1989) 10

Matthewman v. Akahane, 547 F. Supp. 1510 (D.Haw. 1983) 12

TABLE OF AUTHORITIES – Continued

Page

Medo-Bel Creamery v. Oregon, 65 Ore. App. 614, 673 P.2d 537 (1983) 8

Muza v. Missouri Department of Social Services, 769 S.W.2d 168 (Mo. Ct. App. 1989) 8

Owens v. Okure, 488 U.S. 235 (1989) ...5, 11, 12, 14, 15

Pele Defense Fund v. Paty, ___ Haw. ___, 837 P.2d 1247 (1992) 1

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) 3

Perez v. Severs, 869 F.2d 425 (9th Cir.), *cert. denied*, 493 U.S. 860 (1989) 6, 13

Silver v. Queen's Hospital, 63 Haw. 430, 629 P.2d 1116 (1983) 9

Steffel v. Thompson, 415 U.S. 452 (1974) 6

Stoll v. Gottlieb, 305 U.S. 165 (1938) 6

Tamura v. FAA, 675 F. Supp. 1221 (D.Haw. 1987) ....

Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990) ..3, 4, 5, 9, 12

Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183 (5th Cir. 1986) 8

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 3, 9

Wilson v. Garcia, 471 U.S. 261 (1985) 5, 13, 14, 15

Wyatt v. Cole, ___ U.S. ___, 112 S. Ct. 1827 (1992) 10

UNITED STATES CONSTITUTION

Article VI, Supremacy Clause 1, 14

Eleventh Amendment 3, 8, 9, 10

Fourteenth Amendment 2

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES STATUTES

28 U.S.C. Section 1257 1

28 U.S.C. Section 1738 ..... 6, 7, 8

42 U.S.C. Section 1983 ..... *passim*

Hawaii Admission Act Section 5(f), Pub. L. 86-3, 73 Stat. 4 (March 18, 1959) 1, 2, 3

STATE STATUTES

Haw. Rev. Stat. Section 657-1(1) 11

Haw. Rev. Stat. Section 657-1(4) 1, 11, 12, 14

Haw. Rev. Stat. Section 657-4 11

Haw. Rev. Stat. Section 657-7 ..... 11, 12, 13

Haw. Rev. Stat. Section 657-7.3 11

OTHER AUTHORITIES

Restatement (Second) of Judgments Section 87 (1982) 6

18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* Section 4468 (1981) 6

Rule 41(b), Federal Rules of Civil Procedure 8

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioner PELE DEFENSE FUND respectfully requests this Court to issue a writ of certiorari to the Supreme Court of Hawaii to review its decision and judgment of September 28, 1992.

OPINIONS BELOW

The opinion of the Hawaii Supreme Court is reported as *Pele Defense Fund v. Paty*, ___ Haw. ___, 837 P.2d 1247 (1992) and is appended as Appendix A. The trial court's order dismissing the lawsuit is unreported, and is appended as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on September 28, 1992, and is final. The discretionary jurisdiction of this Court is sought pursuant to 28 U.S.C. Section 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The issues in this case involve 42 U.S.C. Section 1983; the Hawaii Admission Act Section 5(f), Pub. L. 86-3, 73 Stat. 4 (March 18, 1959); Haw. Rev. Stat. Sections 657-1(4) and 657-7; the Supremacy Clause of Article VI and the Eleventh Amendment of the Constitution of the United

States. The text of these provisions is appended as Appendix C.

STATEMENT OF THE CASE

This case arises out of a land exchange involving lands ceded to the State of Hawaii under, and subject to obligations specified in, Section 5(f) of the Hawaii Admissions Act (Appendix C) [hereinafter Section 5(f)]. The lands originally ceded to the State were exchanged for private lands owned by respondent Campbell Estate. The exchange became effective on April 23, 1986.

On March 10, 1989, in state court, petitioner filed a complaint under 42 U.S.C. Section 1983 challenging the land exchange. The complaint named only members of the State Board of Land and Natural Resources (BLNR) as defendants. It alleged that the land exchange breached trust obligations imposed by Section 5(f) and violated the Fourteenth Amendment of the Constitution of the United States. Among other things, petitioner alleged that the exchange deprived Native Hawaiians of valuable, undeveloped lands of religious and cultural significance and substituted Campbell Estate lands of little or no significance and value that were substantially covered by lava. The complaint also asserted claims under state law. Petitioner requested, as relief, nullification of the land exchange.

A related Section 1983 suit, also arising out of the alleged breach of trust and seeking nullification of the land exchange, had been filed in federal court against the members of the Board of Land and Natural Resources on

April 25, 1988. The members of the BLNR had filed a motion to dismiss the federal court action on Eleventh Amendment grounds which was pending at the time the complaint was filed in state court. Petitioner filed its parallel action in state court to ensure that, were the federal lawsuit dismissed, it would not be prevented from securing an expeditious and efficient resolution of the merits of its federal and state claims. At the time the state complaint was filed, this Court had not decided *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

On July 26, 1989, the federal action was dismissed for want of jurisdiction. On May 4, 1990, the court of appeals affirmed the dismissal in *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990). The court of appeals held that, given the relief requested, the claim against the members of the Board was necessarily a claim against the state itself, that "there is no allegation that . . . [defendant state officials are] continuing to violate . . . trust duties," and that the Eleventh Amendment therefore deprived federal courts of jurisdiction. *Ulaleo*, 902 F.2d at 1399-1400. By virtue of *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the dismissal included the state law claims. *Ulaleo*, 902 F.2d at 1400. A petition for rehearing was denied.

On December 10, 1990, petitioner activated its state court action by filing an amended complaint. The amended complaint maintained petitioner's assertion that the land exchange violated federal law, but focused the allegation of wrongdoing and request for relief on continuing obligations respecting the management and development of the exchanged land. Members of the Board of Land and Natural Resources were named as

defendants, as were private parties who allegedly took possession of, and sought to develop, the exchanged land with full knowledge of the violation of federal trust obligations pertaining to the land. As appropriate relief, petitioner asked the court to impose a constructive trusteeship, relating to current management and development of the exchanged lands, on the private defendants. Petitioner also asked the court to enjoin the members of the BLNR to comply with continuing trust obligations respecting the exchanged lands.

Defenses of preclusion and a statute of limitations bar were asserted in motions to dismiss filed January 30, 1991. Originally, the preclusion defense was linked to a prior state court decision, *Dedman v. Board of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied* 485 U.S. 1020 (1988). The defense evolved into one based on the decision in *Ulaleo v. Paty, supra*. Petitioner duly countered both defenses in a response to the motions to dismiss, in an objection to a proposed decision and order, and in miscellaneous memoranda.

On May 20, 1991, the court dismissed the lawsuit. It held that all Section 1983 claims related to the disputed land exchange were barred by a two-year statute of limitations, with the exception of petitioner's Fifth and Tenth claims alleging on-going violations and continuing obligations (Appendix B at 85a-89a). In addition, the court held that all Section 1983 claims, except the Fifth and Tenth, were barred from being litigated by the *Ulaleo* decision (Appendix B at 73a-79a). As to the Fifth and Tenth claims, the court held that *Dedman* operated as a bar to litigation (Appendix B at 99a-100a).

The Hawaii Supreme Court affirmed the dismissal of the Section 1983 claims. It held that all claims under Section 1983 were subject to the two-year statute of limitations for "actions for the recovery of compensation for damage or injury to persons or property" (Appendix A at 27a-29a). Petitioner's action was determined to accrue "when PDF discovered or should have discovered the breach of trust, the injury to its members, and the connection between the breach and injury" (Appendix A at 28a-29a, citing state law). The court relied on *Owens v. Okure*, 488 U.S. 235 (1989) and *Wilson v. Garcia*, 471 U.S. 261 (1985) to reach its first conclusion. It applied state accrual rules to reach its second conclusion.

In addition, the Hawaii Supreme Court held that *Ulaleo* precluded litigation of all Section 1983 claims based on Section 5(f) trust obligations or on the Fourteenth Amendment (Appendix A at 31a). The court stated that *Ulaleo's* "finding that PDF sought retrospective relief" in federal court "is binding in this action" (Appendix A at 31a). It held that PDF was barred by the *res judicata* principle against splitting causes of action from "advancing a different remedial theory" in state court (Appendix A at 31a). The court applied state *res judicata* principles in reaching its conclusion.

REASONS A WRIT OF CERTIORARI SHOULD ISSUE

I.

The Hawaii Supreme Court erred in applying state preclusion rules to bar petitioner, by virtue of *Ulaleo v.*

Paty, 902 F.2d 1395 (9th Cir. 1990), from bringing this Section 1983 action in state court. Whether petitioner's Section 1983 action is barred is a matter of federal rather than state law.

This Court has never comprehensively set forth the preclusive effect of federal court decisions on subsequent state court actions. *See*, e.g., *Steffel v. Thompson*, 415 U.S. 452, 470-71 (1974) (citing the opinion of Justice Brennan in *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971)). Nonetheless, as this Court has said, "[p]rovisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction on this Court to determine the effect to be given decrees of a court of the United States in state courts." *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938). *See also, Restatement (Second) of Judgments* Section 87 (1982); and 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* Section 4468 at 656-59 (1981) and 389-90 (Supp. 1992).

In this case, the Hawaii Supreme Court purported to apply state preclusion rules. It apparently believed that this Court's decisions involving interpretations of 28 U.S.C. Section 1738 were applicable to the preclusion argument (Appendix A at 31a, citing *Allen v. McCurry*, 449 U.S. 90 (1980)). Section 1738 directs federal courts to use state preclusion rules to determine the effect of prior state court judgments in subsequent federal court litigation.

As a consequence of its reliance on state preclusion rules, the Hawaii Supreme Court did not take into account important federal interests – e.g., the integrity of the judicial power of the United States or the supremacy

of federal law – in its preclusion analysis. These federal interests are not typically a focal point of state preclusion rules. In fact, the only interests taken into account by the Hawaii Supreme Court appear to be state interests, particularly the state interest in its own sovereignty (Appendix A at 30a-31a). The interest in state sovereignty, even were it well-founded,[1] is insufficient to override federal law. *Cf. Howlett v. Rose*, 496 U.S. 356 (1990).

Certiorari should be granted to establish that the preclusive effect of federal decisions is a matter of federal law and to clarify how federal preclusion principles relate to this Court's decisions interpreting 28 U.S.C. Section 1738.

II.

A special exception to federal *res judicata* principles is not required to protect federal interests at stake in this case. Petitioner does not ask for a special exception. Rather, petitioner objects – under *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230 (1934) and related decisions – to the discriminatory state-law exception that the Hawaii Supreme Court applied to this Section 1983 action.

Preclusion rules normally apply only when a prior decision constitutes a judgment on the merits. *Costello v. United States*, 365 U.S. 265, 284-88 (1961). This Court's

---

[1] The interest in sovereignty arose only because, with circular logic, the Hawaii Supreme Court refused to permit petitioner to sue state officials for relief that would not implicate the State as State.

preclusion analyses rest on that assumption. *See*, e.g., *Federated Department Stores v. Moitie*, 452 U.S. 394, 399 (1981); and *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866). *Cf.* this Court's decisions interpreting 28 U.S.C. Section 1738, beginning with *Allen v. McCurry*, *supra*.

It is not always easy to tell when a decision should be treated as a judgment on the merits. This Court has held, however, that a dismissal is not a judgment on the merits if it is based on the failure of a precondition to the assumption of jurisdiction. *Costello v. United States*, 365 U.S. 265, 285 (1961) (construing a dismissal under Rule 41(b), Fed. R. Civ. P.).

Costello suggests that a dismissal for want of jurisdiction under the Eleventh Amendment would not be a judgment on the merits. By the explicit language used in their orders, the district court and the court of appeals in *Ulaleo* did not consider their dismissal a judgment on the merits. Their treatment of the effect of a dismissal on Eleventh Amendment grounds is consistent with that of other courts. *See*, e.g., *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986); *Muza v. Missouri Department of Social Services*, 769 S.W.2d 168, 176 (Mo. Ct. App. 1989); and *Medo-Bel Creamery v. Oregon*, 65 Ore. App. 614, 616, 673 P.2d 537, 540 (1983).

The Hawaii Supreme Court did not apply federal preclusion principles or consider how dismissals under the Eleventh Amendment should be characterized. Instead, the court created an exception to the normal rule that *res judicata* is applicable only if the prior judgment is on the merits. In creating the exception, it not only

ignored federal preclusion principles. It also ignored the rule that Hawaii courts ordinarily follow. *See*, e.g., *Silver v. Queen's Hospital*, 63 Haw. 430, 629 P.2d 1116 (1983); and *Hall v. State*, 7 Haw. App. 274, 756 P.2d 1048 (1988).

Certiorari should be granted to correct the Hawaii Supreme Court's erroneous creation of a state-law, discriminatory exception to normal preclusion rules that apply to dismissals for want of jurisdiction under the Eleventh Amendment.

III.

The issue petitioner asks this Court to address is whether dismissal of its Section 1983 action in *Ulaleo* precludes the assertion of different Section 1983 claims, involving different wrongs, against different defendants in state court.[2] If the *Ulaleo* Eleventh Amendment dismissal is treated as a judgment on the merits, it is unclear whether a preclusion rule should apply to these circumstances.

The Hawaii Supreme Court's rule is, however, inappropriate. For example, it will create improper burdens for civil rights litigants who choose to sue state officials

---

[2] The petition in this case does not raise the issue of the preclusive effect of an Eleventh Amendment dismissal on a subsequent state court action seeking precisely the same relief from the same defendant state officials. Under Will v. Michigan Department of State Police, 491 U.S. 58 (1989), which establishes more than a mere rule of technical pleading, Hafer v. Melo, 502 U.S. ___, 112 S.Ct. 358, 362 (1991), the members of the BLNR sued in the federal action were not the same "persons" as those sued in the state action.

in federal court. If those litigants do not correctly anticipate how the Eleventh Amendment will be applied, they may find themselves barred from ever litigating the merits of any Section 1983 or state law claims related to the original action, even when different defendants are sued. In addition, under the Hawaii Supreme Court's rule, private defendants, like those sued by petitioner, will effectively receive a derivative form of Eleventh Amendment immunity. *Cf. Wyatt v. Cole*, ___ U.S. ___, 112 S.Ct. 1827 (1992) (rejecting an interpretation of Section 1983 that would have extended immunity to private defendants acting under color of state law).

Finally, the Hawaii Supreme Court's rule has implications not unlike those addressed by this Court in *Martin v. Wilks*, 490 U.S. 755 (1989). In *Martin*, this Court refused to adopt an exception to a rule barring collateral attacks on judgments because the exception would have affected how federal rules of civil procedure respecting joinder and intervention of parties operate in federal court. The Hawaii Supreme Court's exception to normal preclusion rules will affect how rules for joinder of claims and parties will operate in federal court actions when state officials are sued under Section 1983.

Certiorari should be granted to determine what federal rule will serve the interests fostered by preclusion without compromising the purposes of Section 1983, Eleventh Amendment jurisprudence, or federal procedural rules pertaining to joinder of parties and claims.

IV.

The Hawaii Supreme Court selected the state's two-year statute of limitations for "actions for the recovery of

compensation for damage or injury to persons or property," Haw. Rev. Stat. Section 657-7 (Appendix C) to apply to all of petitioner's Section 1983 claims related to the land exchange (Appendix A at 27a-29a and n.15). It rejected the six-year residual statute covering "personal actions of any nature whatsoever not specifically covered by the laws of the state" in Haw. Rev. Stat. Section 657-1(4) (Appendix C).

A straightforward application of *Owens v. Okure*, 488 U.S. 235 (1989) would lead to the adoption of Section 657-1(4) for Section 1983 actions. In *Owens*, this Court stated that the residual statute of limitations should apply to Section 1983 actions when a state has multiple personal injury statutes of limitation. *Id.* at 250.

Hawaii has a number of statutes of limitations for actions for personal injuries other than Section 657-7. *See*, e.g., *Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1 (1973) (legal malpractice claim a "hybrid" tort and contract action governed by the 6-year limitations period in Section 657-1(1)); *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981) (claims for fraudulent and negligent representation governed by 6-year limitations period in sec. 657-1(4)); Haw. Rev. Stat. Section 657-4 (two-year statute for libel and slander); Haw. Rev. Stat. Section 657-7.3 (two- or six-year statute for medical torts).

Section 657-1(4) is the Hawaii statute of limitations that matches the *Owens* criteria for identifying residual statutes. According to this Court, residual statutes of limitations are "easily identifiable by language" and "apply to ALL actions not specifically provided for,

INCLUDING personal injury actions." *Owens v. Okure*, 488 U.S. at 244 (emphasis added).[3]

Contrary to the suggestion of the Hawaii Supreme Court (Appendix A at 26a-27a), Section 657-7 is not the "residual" personal injury statute in Hawaii. Section 657-1(4) is the only residual statute of limitations in Hawaii explicitly applicable to unspecified personal injury actions. In personal injury actions under state law not covered by Section 657-7 or by any explicit Hawaii statute, the Hawaii Supreme Court itself has used Section 657-1(4) as the residual statute,[4] as have federal courts.[5]

---

[3] Colorado's residual statute, which applies to "all other actions of every kind for which no other period of limitation is provided", was cited as an example. Owens v. Okure, 488 U.S. at 244 n.10. Compare the language of the six-year statute of limitations in Haw. Rev. Stat. Section 657-1(4) (Appendix C).

[4] Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981).

[5] Prior to this Court's opinion in *Owens*, federal courts adopted the 6-year statute as appropriate for Section 1983 actions. Although their analysis did not track that in *Owens* (in that the courts characterized Section 1983 actions as actions created by statute), their decisions are relevant in that they considered the six-year statute to be Hawaii's residual statute. *See*, e.g., Lai v. City and County of Honolulu, 749 F.2d 588 (9th Cir. 1984) (Section 657-1(4) promotes the strong federal interest in a generous limitations period that is consistent with the broad purposes of Section 1983); Matthewman v. Akahane, 547 F.Supp. 1510 (D.Haw. 1983) (since one-year limitations provision would discriminate against Section 1983 claims, the six-year limitations period of Section 657-1(4) should be used). *Cf.* Tamura v. FAA, 675 F.Supp. 1221 (D.Haw. 1987) (the six-year limitations period of Section 657-1(4) applies to constitutional causes of action).

Although it is not impossible for a state to have two residual statutes of limitations, one for personal injury actions and one for all other actions, the State of Hawaii does not have two. *Compare, Del Percio v. Thornsley*, 877 F.2d 785 (9th Cir. 1989). The language of Haw. Rev. Stat. Section 657-7 is not sufficiently general, as written or interpreted, to make the statute a residual statute. *Compare, Perez v. Severs*, 869 F.2d 425 (9th Cir.), *cert. denied*, 493 U.S. 860 (1989).

The Hawaii Supreme Court's decision employs a variation of the "most analogous tort" analysis rejected in *Wilson v. Garcia*, 471 U.S. 261 (1985). The court first interpreted Section 657 as the statute applicable to personal injury actions involving physical harm. It then analogized Section 1983 actions to personal injury actions for physical injuries and held that *Wilson* should be read to authorize courts to select the personal injury statute governing actions for "physical" injuries as the residual statute (Appendix A at 27a-28a and n.14).

The Hawaii Supreme Court's analysis is inconsistent with *Wilson's* recognition that Section 1983 covers a broad range of injuries to the person that do not entail physical injury, including those arising out of denials of due process and employment discrimination. It is also incompatible with *Wilson's* refusal to permit narrow state-law analogies to interfere with the broad remedial purposes of Section 1983.

Finally, the Hawaii Supreme Court's selection of the two-year statute impermissibly discriminates against Section 1983 claims under *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230 (1934) and related decisions. The residual statute for personal injury claims in Hawaii

is, according to the Hawaii Supreme Court, Section 657-1(4). *See* cases cited, *supra*. The opinion of the Hawaii Supreme Court in this case suggests no inclination to authorize state courts to depart from the established use of Hawaii's six-year residual statute in state-law personal injury claims. By rejecting Section 657-1(4) for Section 1983 claims, the Hawaii Supreme Court discriminated against federal claims.

Certiorari should be granted to correct the Hawaii Supreme Court's erroneous and discriminatory application of its two-year statute of limitations to petitioner's Section 1983 claims.

V.

This Court has never determined whether *Owens* and *Wilson* apply to the choice of a statute of limitations when a Section 1983 claim is pursued in state court. In *Felder v. Casey*, 437 U.S. 131 (1988), this Court applied a similar preemption analysis to a notice-of-claim provision that operated quite like a statute of limitations.

Although an analysis using *Owens* and *Wilson* may ordinarily produce the same outcome as a *Felder* analysis, the *Felder* analysis is calculated to focus attention on potential conflicts between state and federal policy and the non-discrimination principles of the Supremacy Clause of Article VI of the Constitution of the United States. Federal policy and non-discrimination issues may not need special emphasis when federal courts select a state statute of limitations in Section 1983 actions, but the issues warrant special emphasis when state courts are called on to select a statute of limitations. The *Felder* analysis would provide necessary emphasis

and guidance, missing from the *Wilson* and *Owens* criteria, to state courts.

Certiorari should be granted to clarify the appropriate principles to be used by state courts in selecting a statute of limitations for Section 1983 actions.

VI.

The Hawaii Supreme Court erroneously applied a state rule for determining when a Section 1983 cause of action accrues. Moreover, it applied an accrual rule inappropriate for claims of on-going violations of federal law.

Accrual rules in Section 1983 litigation are a matter of federal law. *Delaware v. Ricks*, 449 U.S. 250 (1980). In this case, petitioner alleges on-going wrongful conduct by both state officials and private parties related to the management and development of lands argued to be subject to a constructive trust. Accrual of a Section 1983 cause of action based on this claim cannot be determined without some consideration of the substantive nature of the obligations at stake in this lawsuit.

The Hawaii Supreme Court failed to consider these obligations and principles.[6] Certiorari should be granted to correct the court's clear and prejudicial error.

---

[6] On the other hand, the Hawaii Supreme Court's error may have been foreordained by its preclusion analysis. Compare, the trial court, which held that the 2-year statute did not bar either the Fifth or Tenth claims for relief asserted by petitioner (Appendix B at 85a-89a, Conclusion of Law 6). The trial court distinguished between claims involving continuing injury and past injury.

CONCLUSION

Certiorari should be granted and the judgment under review should be reversed with instructions to reinstate the complaint for further proceedings.

Respectfully submitted,

STEVEN C. MOORE, ESQ.
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

PAUL F.N. LUCAS, ESQ.
ALAN T. MURAKAMI, ESQ.
Native Hawaiian Legal
Corporation
1270 Queen Emma Street
Suite 1004
Honolulu Hawaii 96813
(808) 521-2302

YUKLIN ALULI, ESQ.
415-C Uluniu Street
Kailua, Hawaii 96734
(808) 262-5900

Attorneys for Pele Defense Fund

Of Counsel:

EMILY CALHOUN, ESQ.
Professor of Law
University of Colorado
School of Law
Boulder, Colorado 80309
(303) 492-7592

December 1992

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII

PELE DEFENSE FUND, Plaintiff-Appellant v. WILLIAM PATY, in his capacity as Chairperson of the Board of Land and Natural Resources, State of Hawaii, MOSES KEALOHA, DOUGLAS ING, LEONARD ZALOPANY, JOHN ARISUMI and HERBERT ARATA, in their capacity as members of the Board of Land and Natural Resources, THE ESTATE OF JAMES CAMPBELL, Deceased, FRED E. TROTTER, W.H. McVAY, P.R. CASSIDY, and HERBERT C. CORNUELLE, in their fiduciary capacity as Trustees under the Will of James Campbell, Deceased, TRUE ENERGY GEOTHERMAL CORP., TRUE GEOTHERMAL DRILLING CO., and MID-PACIFIC GEOTHERMAL, INC., Defendants-Appellees

No. 15373

APPEAL FROM THE THIRD CIRCUIT COURT, HILO DIVISION

(CIV. NO. 89-089)

(Filed September 28, 1992)

LUM, C.J., WAKATSUKI*, MOON, KLEIN, AND LEVINSON, JJ.

CIVIL RIGHTS – federal remedies – civil actions in general – persons protected and entitled to sue – private right of action.

A claim may be brought pursuant to 42 U.S.C. § 1983 (§ 1983) to enforce federal rights created by

---

* Associate Justice Wakatsuki, who heard oral argument, passed away on September 22, 1992. *See* HRS § 602-10 (1985).

§ 5(f) of the Hawaii Admission Act although the Admission Act itself does not create an implied right of action under which a party could enforce the duties and obligations created by the Act in federal court.

SAME – same – same– same – persons aggrieved, and standing in general.

ACTIONS – grounds and conditions – persons entitled to sue.

Regardless of the standing theory, the crucial inquiry is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his behalf.

CIVIL RIGHTS – federal remedies – civil actions in general – persons protected and entitled to sue – persons aggrieved, and standing in general.

ACTIONS – grounds and conditions – persons entitled to sue.

Hawaii has adopted a broad view of what constitutes a "personal stake" in cases where the rights of the public might otherwise be denied hearing in a judicial forum.

CIVIL RIGHTS – federal remedies – civil actions in general – persons protected and entitled to sue – persons aggrieved, and standing in general.

ACTIONS – grounds and conditions – persons entitled to sue.

A member of the public has standing to sue to enforce the rights of the public generally if he or she can show that he or she has suffered an injury in fact and that the concerns of a multiplicity of suits are satisfied.

CIVIL RIGHTS – federal remedies – civil actions in general – persons protected and entitled to sue – persons aggrieved, and standing in general.

ACTIONS – grounds and conditions – persons entitled to sue.

A plaintiff has suffered injury in fact when (1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for plaintiff's injury.

CIVIL RIGHTS – federal remedies – civil actions in general – persons protected and entitled to sue – persons aggrieved, and standing in general.

A membership corporation has standing to sue on behalf of its members when the alleged injuries are "generalized" injuries for which relief granted to the organization would provide a remedy to any individual member.

FEDERAL COURTS – state laws as rules of decision – application to particular matters – limitation laws – computation and tolling.

CIVIL RIGHTS – federal remedies – civil actions in general – defenses; time to sue.

Federal law dictates the characterization of claims brought under § 1983, but the applicable limitations period is a matter of state law.

FEDERAL COURTS – state laws as rules of decision – application to particular matters – limitation laws – computation and tolling.

CIVIL RIGHTS – federal remedies – civil actions in general – defenses; time to sue.

A single, most appropriate statute of limitations for all § 1983 claims is to be selected in each state. Section 1983 claims are best characterized as personal injury actions; thus a state's personal injury statute of limitations should be applied to all § 1983 claims.

FEDERAL COURTS – state laws as rules of decision – application to particular matters – limitation laws – computation and tolling.

CIVIL RIGHTS – federal remedies – civil actions in general – defenses; time to sue.

Where a state has more than one statute of limitations for personal injury actions, the residual or general *personal injury* statute of limitations applies to all § 1983 claims.

FEDERAL COURTS – state laws as rules of decision – application to particular matters – limitation laws – computation and tolling.

CIVIL RIGHTS – federal remedies – civil actions in general – defenses; time to sue.

In Hawaii, HRS § 657-7 is the general *personal injury* statute of limitations. The two-year statute of limitations in HRS § 657-7 applies to all § 1983 claims brought in Hawaii.

FEDERAL COURTS – state laws as rules of decision – application to particular matters – limitation laws – computation and tolling.

CIVIL RIGHTS – federal remedies – civil actions in general – defenses; time to sue.

The statute of limitations for a breach of the § 5(f) trust, brought under § 1983, runs from the date that the cause of action accrues – that is, when plaintiff discovered or should have discovered the breach of trust, the injury to plaintiff, and the connection between the breach and the injury.

JUDGMENT – merger and bar of causes of action and defenses – judgments operative as bar – nature and requisites of former recovery as bar in general.

The judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

SAME – conclusiveness of adjudication – matters concluded – scope and extent of estoppel in general.

Collateral estoppel is an aspect of *res judicata* which precludes the relitigation of a fact or issue

which was previously determined in a prior suit on a different claim between the same parties or their privies. Collateral estoppel also precludes relitigation of facts or issues previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue.

SAME – same – judgments conclusive in general – nature and requisites of former adjudication as ground of estoppel in general.

The principles of *res judicata* and collateral estoppel are tempered only by the prerequisite that a plaintiff had a full and fair opportunity to litigate the relevant issues in the earlier litigation.

SAME – merger and bar of causes of action and defenses – causes of action and defenses merged, barred, or concluded – splitting cause of action.

The rule against splitting a cause of action is an aspect of *res judicata* and precludes the splitting of a single cause of action or an entire claim either as to the theory of recovery of the specific relief demanded.

CONSTITUTIONAL LAW – construction, operation, and enforcement of constitutional provisions – general rules of construction – relation to former or other constitutions or statutes.

The Hawaii Supreme Court is not precluded from finding that the Hawaii Constitution affords greater protection than required by similar federal constitutional or statutory provisions.

SAME – same – same – same.

As the highest court of this sovereign state, the Hawaii Supreme Court will interpret and enforce the state constitution not in total disregard of federal interpretations, but with reference to the wisdom of adopting these interpretations for our state.

CONSTITUTIONAL LAW – personal, civil and political rights – constitutional guaranties in general – particular rights, limitations, and applications – public lands trust.

A suit brought to protect the res of the public lands trust, and thereby enforce the mandates of article XII, § 4 of the Hawaii Constitution is appropriate in Hawaii courts.

SAME – same – same – same – same.

Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions, and the citizens of the State must have a means to mandate compliance.

SAME – same – same – same – same.

A non-profit membership corporation, whose members are beneficiaries of the public lands trust, may bring suit for the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawaii constitutional and statutory provisions governing the public lands trust.

STATES – actions against – liability and consent of state to be sued – what are suits against state or state officers.

Sovereign immunity is not a bar to suit for injunctive relief when state officials acting in their official capacities act *ultra vires* of state and federal law.

SAME – same – same – same.

It is the unquestioned rule that the State cannot be sued without its consent or waiver of its immunity in matters involving the enforcement of contracts, treasury liability tort, and the adjudication of an interest in property acquired by the government. However, sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional.

SAME – same – same – same.

The sovereign State is immune from suit for money damages, except whether there has been a "clear relinquishment"? of immunity and the State has consented to be sued.

SAME – same – same – same.

When a plaintiff requests only prospective injunctive relief, sovereign immunity is not a bar to an official capacity suit against state officials.

SAME – same – same – same.

Relief that is tantamount to an award of damages for a past violation of law, even though styled as something else, is barred by sovereign immunity.

SAME – same – same – same.

Simply asking for injunctive relief and not damages *does not* clear the path for suit – the question remains whether the effect on the state treasury would be "ancillary" or would be virtual compensation for the past misconduct of state officials.

SAME – same – same – same.

A request to restore the trust status of former public trust lands by means of a constructive trust is "essentially equivalent" to a nullification of the exchange of those lands and the return of the exchanged lands to the trust res. The effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands now held by a private landowner would require that the State compensate the landowner for its property.

APPEAL AND ERROR – assignments of errors – effect of failure to assign particular errors – in general.

Issues not properly raised on appeal will be deemed to be waived.

PARTIES – defendants – persons who may or must be sued – trustees and others holding legal title.

There is no adequate remedy available for alleged breaches of trust absent the trustee's participation.

CONSTITUTIONAL LAW – personal, civil and political rights – constitutional guaranties in general – particular rights, limitations, and applications – traditional Hawaiian rights.

ACTIONS – grounds and conditions – persons entitled to sue.

A non-profit corporation, whose stated purpose is to perpetuate Hawaiian religion and culture, has standing to assert violation of article XII, § 7 on behalf of its native Hawaiian members.

CONSTITUTIONAL LAW – personal, civil and political rights – constitutional guarantees in general – particular rights, limitations, and applications – traditional Hawaiian rights.

Lawful occupants of an ahupua'a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupa'a to gather those items enumerated in HRS § 7-1.

SAME – same – same – same – same.

The precise nature and scope of rights retained by HRS § 1-1 depend upon the particular circumstances of each case.

SAME – same – same – same – same.

The 1978 Constitutional Convention Committee on Hawaiian Affairs added what is now article XII, § 7 to reaffirm the customarily and traditionally exercised rights of native Hawaiians, while giving the State the power to regulate these rights.

SAME – same – same - same – same.

Article XII, § 7 reaffirms *all* rights customarily and traditionally held by ancient Hawaiians.

SAME – same – same – same – same.

Native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.

OPINION OF THE COURT BY KLEIN, J.

In December, 1985, the State of Hawaii (the State) exchanged approximately 27,800 acres of public "ceded" lands, including the Wao Kele 'O Puna Natural Area Reserve and other Puna lands on the Island of Hawaii, for approximately 25,800 acres of land owned by the Estate of James Campbell, Deceased, (Campbell Estate or Campbell) at Kahauale'a. Plaintiff-Appellant Pele Defense Fund (PDF) primarily argues that the exchange constitutes a breach of the trust created under § 5(f) of the Hawaii Admission Act and article XII, § 4 of the Hawaii Constitution. The § 5(f) claim is brought under 42 U.S.C. § 1983 (section 1983 or § 1983). PDF also alleges that: the exchange violates article XII, § 7 of the Hawaii Constitution, Hawaii Revised Statutes (HRS) chapters 171 and

195, and the constitutional right to due process; and that defendants-appellees Campbell, True Energy Geothermal Corp., True Geothermal Drilling Co., and Mid-Pacific Geothermal Inc.'s[1] exclusion of PDF members from the exchanged lands violates their rights under article XII, § 7. PDF's prayer for relief seeks a declaration that the exchange was a breach of trust and a violation of law and requests a return of the exchanged lands to ceded land status via a constructive trust or another land exchange.

These issues are presented to us on appeal from the Third Circuit Court's Findings of Fact, Conclusions of Law and Decision and Order Granting Defendants' Motions to Dismiss, or Alternatively, for Partial Summary Judgment (Order Granting Summary Judgment). We affirm in part and reverse in part and remand on the limited question of whether Campbell and True should be enjoined from disallowing PDF's native Hawaiian members access into undeveloped areas of Wao Kele 'O Puna for traditional subsistence, cultural, and religious purposes.

FACTS

Hawaii's ceded lands are lands which were classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893. Upon annexation in 1898, the Republic of Hawaii ceded these lands to the United States. In 1959, when Hawaii was admitted into the Union, the ceded lands were transferred to the newly

---

[1] True Energy Geothermal Corp., True Geothermal Drilling Co., and Mid-Pacific Geothermal Inc. will be referred to, collectively, as True or the True defendants.

created state, subject to the trust provisions set forth in § 5(f) of the Admission Act. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959). Section 5(f) provides:

> The lands granted to the State of Hawaii by subsection (b) of this section . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust
>
> [1] for the support of the public schools and other public educational institutions,
>
> [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended,
>
> [3] for the development of farm and home ownership on as widespread a basis as possible,
>
> [4] for the making of public improvements, and
>
> [5] for the provision of lands for public use.
>
> Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State shall provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

73 Stat. at 6.

The public lands trust is also recognized in the Hawaii Constitution. Article XII, § 4 declares:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as

> "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Haw. Const. art. XII, § 4.[2] The Department of Land and Natural Resources (DLNR), headed by an executive board known as the Board of Land and Natural Resources (BLNR), is the agency charged with the administration of public lands, including those subject to the § 5(f) trust. HRS § 171-3 (Supp. 1991). HRS chapter 171 governs the management and disposition of public lands in general. HRS chapter 195 establishes that certain lands, endowed with "unique natural resources," should be preserved "in perpetuity" in a statewide Natural Area Reserves System (NARS). HRS § 195-1 (1985). In 1987, chapter 195 was amended to allow alienation of NARS land for "another public use upon a finding by the [DLNR] of an imperative and unavoidable public necessity." HRS § 195-10

---

[2] In article XVI, § 7, referred to by article XII, § 4, the State affirmatively assumes the § 5(f) trust responsibilities:

> Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XIII.

Haw. Const. art. XVI, § 7 (1959), amended 1978). The "available lands" specifically excluded by article XII, § 4 are also held in trust by the State as the Hawaiian Home Lands Trust. *See* Haw. Const. art. XII, §§ 1-3 (1959, amended 1978). This suit raises no issues pertaining to the Hawaii Home Lands Trust.

(Supp. 1991). Within this legal framework, we review the contested land exchange.

On December 23, 1985, the State and Campbell exchanged deeds, the State receiving Campbell's Kahauale'a land and Campbell receiving Puna lands including the Wao Kele 'O Puna NARS land, the Puna Forest Reserve and other state lands. The exchange followed a series of studies and hearings and the designation of a portion of the Kilauea Middle East Rift Zone (KMERZ), located primarily within Wao Kele 'O Puna, as a geothermal resource subzone. The designation of the geothermal resource subzone and the granting of a geothermal development permit were previously reviewed and upheld by this court on appeal from the BLNR's decisions. *See Dedman v. Board of Land & Natural Res urces*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988).[3]

In January 1986, pursuant to HRS § 171-50(c), the BLNR submitted the land exchange to both the senate and the house of representatives of the Hawaii Legislature for review.[4] The exchange became effective when the Legislature failed to disapprove it by April 23, 1986, the

---

[3] Our opinion in *Dedman* contains a detailed recitation of the events leading up to the geothermal resource subzone designation and the land exchange. *Dedman*, 69 Haw. at 257-58, 740 P.2d at 30-31.

[4] HRS § 171-50(c) (1985) provides in relevant part:
Any exchange of public land for private land shall be subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of the exchange.

last day of the 1986 legislative session. Nearly a year later, Executive Order No. 3103, designating Wao Kele 'O Puna as NARS land, was canceled by Executive Order No. 3359, and Wao Kele 'O Puna was transferred out of the NARS.

PDF and Kaolelo Lambert John Ulaleo (Ulaleo) filed a lawsuit against the BLNR members in their official capacities, on April 25, 1988, in the United States District Court for the District of Hawaii. *See Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990). Ulaleo and PDF brought suit under § 1983, seeking to invalidate the exchange based on alleged violations of the § 5(f) trust provisions and the due process clause of the fourteenth amendment. *Id.* The federal complaint also alleged violations of state law and the state constitution. *Id.* Upon defendants' motion, the district court dismissed all claims. *Id.* at 1396.

During the pendency of the appeal to the Ninth Circuit Court of Appeals, Ulaleo died; PDF continued the appeal as the sole plaintiff. *Id.* at 1397. The Ninth Circuit affirmed the dismissal of the § 1983 claims, holding that suit was barred by the eleventh amendment because PDF was, in fact, seeking retrospective relief. *Id.* at 1398-1400. PDF's pendent state law claims were also barred because, after the federal claims were dismissed, the justification for adjudicating them in federal court no longer existed. *Id.* at 1400. The court noted that, "[t]he claims could be brought very appropriately in the state court, or given the nature of the dispute and the statutory language, before even the state legislature." *Id.*

PDF filed the complaint in this action on March 10, 1989, while the federal suit was still pending. After

Ulaleo's death in early 1990, Emily 'Iwalani Naeole (Naeole) moved to intervene as a plaintiff, pursuant to Hawaii Rules of Civil Procedure (HRCP) 24(a). Naeole claimed an interest, as a native Hawaiian and a resident of the ahupua'a[5] adjacent to Wao Kele 'O Puna, in the subject matter of the action, such that disposition of the action would, as a practical matter, impair or impede her interest, and that no other party adequately represented that interest. The circuit court denied Naeole's motion, finding that her "interests are adequately represented by Plaintiff Pele Defense Fund which remains as an existing party."[6]

On December 13, 1990, several months after the Ninth Circuit decision was announced, PDF filed an amended complaint, adding Campbell and True as defendants and modifying its prayer for relief to eliminate the request to declare the exchange a nullity. We summarize PDF's claims for relief as follows:

> 1. Breach of trust under (a) § 5(f) of the Admission Act, in violation of § 1983, and (b) article XII, § 4 of the Hawaii Constitution;
>
> 2. Violation of due process under (a) the fourteenth amendment of the U.S. Constitution, contrary to § 1983, and (b) article I, § 5 of the Hawaii Constitution;

---

[5] An ahupua'a in ancient Hawaii was a division of land which usually ran from the sea to the mountains. *See generally Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968).

[6] Ironically, only a few months later, the same court found that Pele Defense Fund did not have standing to litigate claims on behalf of native Hawaiians such as Ms. Naeole in its Order Granting Summary Judgment.

3. Violation of the right to free association under the first amendment to the United States Constitution and article I, § 4 of the Hawaii Constitution;

4. Violation of article XII, § 7 by (a) the relinquishment of state lands on which native Hawaiians customarily and traditionally exercised subsistence, cultural and religious practices and (b) the continued denial of access into Wao Kele 'O Puna to native Hawaiian PDF members who seek access for customarily and traditionally exercised subsistence, cultural and religious practices;

5. Violation of HRS §§ 171-26 and 171-50;

6. Violation of HRS chapter 195; and

7. Based on the foregoing violations, Campbell and True hold the exchanged lands subject to a constructive trust for the beneficiaries of the public lands trust.

The defendants raised a multitude of defenses, the most salient of which form the basis for the Order Granting Summary Judgment, including: sovereign immunity, statute of limitations, lack of standing, no private right of action, *res judicata*, collateral estoppel, failure to state a claim for which relief can be granted, and absence of indispensable parties. The circuit court concluded, in its forty-one page order, that there are "no material issues of relevant fact" between PDF and the defendants and dismissed the action in its entirety.

DISCUSSION

I. Section 1983 Claims

PDF argues that state officials who violate § 5(f) of the Admission Act may be sued in their official capacities for declaratory and injunctive relief under § 1983. The circuit court dismissed PDF's § 1983 claims on the basis of sovereign immunity, PDF's lack of standing, the statute of limitations, and the *res judicata* effect of *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990). We acknowledge that sovereign immunity would not bar a § 1983 action brought against state officials in their official capacities prospectively to enjoin an alleged violation of § 5(f), and we find that PDF has standing to pursue such a claim. However, we also conclude that, in this case, PDF's § 1983 claims are barred by the statute of limitations and *res judicata*.

A. Right to Sue

The Ninth Circuit Court of Appeals has long recognized that a claim may be brought pursuant to § 1983 to enforce federal rights created by § 5(f) of the Admission Act.[7] *See Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990), *cert.*

---

[7] Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

denied, 112 S. Ct. 436 (1991); *Ulaleo*, 902 F2d at 1397; *Price v. State*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n (Keaukaha II)*, 739 F.2d 1467 (9th Cir. 1984). The Ninth Circuit had previously ruled that the Admission Act itself did not create an implied right of action under which a party could enforce the duties and obligations created by the Act in federal court. *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n (Keaukaha I)*, 588 F.2d 1216 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979). One of the bases for the court's ruling was that it saw "no federal purpose to be served by reading a private cause of action into the Admission Act." *Id.* at 1224. The court found the action to be "a matter of state concern" and held it would be "most appropriate for Hawaii's laws and judicial system to deal with it." *Id.* We will, in this case, clarify the role of Hawaii's court in enforcing the terms of the public lands trust.

B. Standing

PDF asserts that it has standing to challenge the disposition of § 5(f) lands because its members have suffered an "injury in fact" as a result of actions taken by state officials. The Ninth Circuit agreed in *Ulaleo*, finding that PDF had standing to sue to enforce the terms of the § 5(f) trust. 902 F.2d at 1397.[8]

---

[8] The Ninth Circuit has consistently held that native Hawaiians and native Hawaiian groups have standing to bring claims to enforce the trust provisions of the Admission Act. In *Price v. State*, 939 F.2d 702 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1480 (1992), citing its earlier opinions, the court held that "persons in the position of these appellants do have standing to

We hold that PDF has standing to bring its claims in Hawaii courts, consistent with this court's decisions lowering standing barriers in cases of public interest. *See, e.g., In re Banning*, No. 15109, slip op. at 18-19 (Haw. July 7, 1992); *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982); *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 623 P.2d 431 (1981); *In re Applic. of Haw'n Elec. Co., Inc.*, 56 Haw. 260, 535 P.2d 1102 (1975). Regardless of the standing theory, "the crucial inquiry . . . is 'whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of . . . [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 281, 768 P.2d 1293, 1298 (1989) (citations omitted). This court has adopted a broad view of what constitutes a "personal stake" in cases in

---

challenge the use of section 5(f) lands." *Id.* at 706 (citations omitted).

In the 1990 case brought by Price on behalf of the Hou Hawaiians, the Ninth Circuit held that Price, a native Hawaiian, had made allegations "sufficient to show an 'injury in fact'" even though legitimate § 5(f) uses might not necessarily benefit native Hawaiians. *Price v. Akaka*, 928 F.2d 824, 826 (9th Cir. 1990) (citations omitted), *superseding* 915 F.2d 469 (9th Cir. 1990). The court continued: "In addition, allowing Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends on the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust." *Id.* at 826-27 (citations omitted). In a footnote, the court rejected the OHA trustees' argument that the 1985 *Price v. State* standing ruling should not apply because Price was now seeking retrospective relief. *Id.* n. 2. The court found that its standing decision applied to past and future alleged § 5(f) violations. *Id.; see also Price v. State*, 764 F.2d 623 (9th Cir. 1985) and *Keaukaha II*, 739 F.2d 1467 (9th Cir. 1984).

which the rights of the public might otherwise be denied hearing in a judicial forum. *Id* at 283, 768 P.2d at 1299; *see also Akau*, 65 Haw. at 387-88, 652 P.2d at 1134.

In *Akau*, we held "that a member of the public has standing to sue to enforce the rights of the public generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action." 65 Haw. at 388-89, 652 P.2d at 1134 (cited in *Hawaii's Thousand Friends*, 70 Haw. at 283, 768 P.2d at 1299). A plaintiff has suffered injury in fact when (1)he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2)the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for plaintiff's injury. *Akau*, 65 Haw. at 389, 652 P.2d at 1134-35 (citations omitted); *see also Hawaii's Thousand Friends*, 70 Haw. at 283, 768 P.2d at 1299.

The State argues that our holding in *Hawaii's Thousand Friends* requires a finding that PDF has suffered no injury in fact. We disagree. In that case, we held that Hawaii's Thousand Friends (HTF) lacked standing to bring claims on behalf of its members who were allegedly misled by advertisements run by the defendants. 70 Haw. at 284, 768 P.2d at 1300. We found that the injury arising out of the misrepresentation was a personalized injury, not suffered by the group in general. *Id*. Each HTF member would have relied differently on the alleged misrepresentation and would have suffered different injuries,

necessitating different remedies. *Id.* at 284-85, 768 P.2d at 1300[9].

In this case, the alleged § 5(f) violations are "generalized" injuries for which relief granted to the organization would provide a remedy to any individual member. In other words, if a court were to grant PDF an injunction remedying the State's breach of its trust obligations, PDF members and other trust beneficiaries would benefit indistinguishably. Furthermore, applying the three-pronged "injury in fact" test, we conclude that PDF has adequately alleged that: (1) its members are beneficiaries of the public trust who have been economically and/or aesthetically injured by a transfer of trust lands in contravention of trust terms; (2) its injuries are traceable to the alleged breach of trust; and (3) the requested relief would be likely to remedy the injuries by giving beneficial use of the exchanged land to trust beneficiaries. Thus, we conclude that PDF has alleged facts sufficient to show that it has suffered injury in fact.

In addition to injury in fact, *Akau* requires a showing that "the concerns of a multiplicity of suits are satisfied"

---

[9] HTF's other claims were also dismissed for lack of standing because HTF suffered no injury in fact under *Akau*. HTF alleged that the illegal use of public money depleted funds that could be used for other programs and that HTF had to expend its own funds to investigate defendants' illegal conduct. *Hawaii's Thousand Friends*, 70 Haw. at 283-84, 768 P.2d at 1299. We found that these claims lacked allegations of concrete injuries and HTF was merely asserting a value preference and not judicially congnizable claims. *Id.* In contrast, PDF alleges the breach of trust responsibilities which are codified in federal and state law and incorporated into the Hawaii Constitution.

by allowing a plaintiff to sue to enforce the rights of the public. *Akau*, 65 Haw. at 388-89, 652 P.2d at 1134. Although this case is not a class action suit like *Akau*, a multiplicity of suits may be avoided by allowing PDF to sue to enforce the State's compliance with the § 5(f) trust provisions, because granting a remedy to PDF would also provide relief to its members and other trust beneficiaries. Additionally, unless members of the public and native Hawaiians, as beneficiaries of the trust, have standing, the State would be free to dispose of the trust res without the citizens of the State having any recourse. *See Kapiolani Park Preservation Soc'y v. City of & County of Honolulu*, 69 Haw. 569, 572, 751 P.2d 1022, 1025 (1988) (The court held that Kapiolani Park Preservation Society, a non-profit corporation whose members included neighbors and users of the park, had standing to bring breach of trust claims under the circumstances of that case; we stated that "the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.")

C. Statute of Limitations

PDF disputes the circuit court's conclusion that this suit was not timely under the statute of limitations applicable to § 1983 actions. The critical inquiry, i.e., which Hawaii statute applies to § 1983 actions, is a matter of first impression.[10] We hold that the two-year statute of

---

[10] Although not squarely before the court, the Circuit Court of Appeals for the Ninth Circuit cited HRS § 657-7 as the applicable statute of limitations in *Price v. State*, 939 F.2d 702 (9th Cir.

limitations set forth in HRS § 657-7 governs § 1983 actions,[11] rather than the six-year statute of limitations set forth in HRS § 657-1(4).[12]

Federal law dictates the characterization of claims brought under § 1983. *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). However, the applicable statute of limitations is a matter of state law. *Id.* at 269. In *Wilson*, the United States Supreme Court decided that a single, most appropriate statute of limitations for all § 1983 claims should be selected in each state. *Id.* at 275. This conclusion was based on the "federal interests in uniformity, certainty, and minimization of unnecessary litigation." *Id.* The Court held that "§ 1983 claims are best characterized as personal injury actions." *Id.* at 280.

1991). In a footnote, the Ninth Circuit indicated (in dictum) that HRS § 657-7 would apply to § 1983 actions in Hawaii:

> At any rate, if the seeking of state court approval were the wrong in question, that occurred in 1969 and the statute of limitations has long since run. Haw. Rev. L. [sic] § 657-7. *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989).

Id. at 708 n.7.

[11] HRS § 657-7 (1985) provides in relevant part:

> Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after. . . .

[12] HRS § 657-1 (1985) provides in relevant part:

> The following actions shall be commenced within six years next after the cause of action accrued, and not after:
>
> . . . .
>
> (4) Personal actions of any nature whatsoever not specifically covered by the laws of the State.

In *Owens v. Okure*, 488 U.S. 235 (1989), the Court reaffirmed that "a State's personal injury statute of limitations should be applied to all § 1983 claims." *Id.* at 240-41 (citing *Wilson*, 471 U.S. at 280). The Court again explained that it had, in *Wilson*, departed from its earlier rulings which had urged courts to pick the "most analogous" and "most appropriate" statute of limitations for the particular § 1983 claims. *Id.* at 239. The Court noted that the "most analogous" method "bred confusion and inconsistency . . . and generated time-consuming litigation." *Id.* at 240.

Owens also resolved the question of which statute of limitations applies to § 1983 claims where a state has more than one statute of limitations for personal injury actions. *Id.* at 236. The court held that the "residual or general personal injury statute of limitations applies." *Id.* In this case, PDF argues that Hawaii's "residual" statute of limitations in HRS § 657-1(4) applies, rather than the residual *personal injury* statute of limitations appearing in HRS § 657-7. However, *Owens* and two subsequent Ninth Circuit cases counsel us to reject this argument.

When discussing the "residual or general" personal injury statute of limitations, the *Owens* Court was comparing general *personal injury* provisions with provisions that govern specific *personal injury* claims, such as statutes that cover particular intentional torts.*See, e.g.*, HRS § 657-4 (1985) (governing libel and slander); HRS § 657-7.3 (1985 & Supp. 1991) (governing medical torts); *see also Owens*, 488 U.S. at 241, 243-48. The Ninth Circuit further clarified that when a state has a general personal injury statute of limitations, an even broader "catchall"

statute of limitations like HRS § 657-1 need not be considered. *See Del Percia v. Thornsley*, 877 F.2d 785, 786 (9th Cir. 1989) (California's general personal injury statute applies to § 1983 actions, rather than its "catchall" statute of limitations); *Perez v. Severs*, 869 F.2d 425, 426 (9th Cir.), *cert. denied*, 493 U.S. 860 (1989) (Nevada's general personal injury statute of limitations applies to § 1983 actions and thus the residual statute of limitations need not be considered).[13]

In Hawaii, HRS § 657-7 is the "general" *personal injury* statute of limitations. This statute applies to "[a]ctions for the recovery of compensation for damage or *injury to persons* or property" and is distinguished from specific personal injury statutes like HRS §§ 657-4 and 657-7.3. We agree with the Ninth Circuit's interpretation of *Wilson* and *Owens* and conclude that the United States Supreme Court intended that a state's "catchall" provision would apply only if there were no general personal injury statute. *See, e.g., Del Percia*, 877 F.2d at 786.[14] Thus,

---

[13] In *Perez*, the Ninth Circuit interpreted the United States Supreme Court's ruling in *Owens* as follows:

> The Court provided that if there are multiple statutes of limitations for various types of personal injury claims, the residual statute of limitations for personal injury actions is to be applied. If there is no residual statute of limitations for personal injury claims, [only] then the general residual statute of limitations for all action is applicable.

869 F.2d at 426.

[14] PDF also argues that two Hawaii Supreme Court decisions support the application of HRS § 657-1(4) in this case. We disagree. In *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981), the court considered which statute of limitations applied to a claim of

the two-year limitations period set forth in HRS § 657-7 applies to PDF's claims under § 1983.

The statute of limitation runs from the date that PDF's cause of action accrued – that is, when PDF discovered or should have discovered the breach of trust, the injury to its members, and the connection between the breach and the injury. *See* HRS § 657-7; *cf. Yamaguchi v.*

---

fraudulent misrepresentation which induced the plaintiff to purchase a leaky home. The court stated that "HRS 657-7 has been interpreted to apply to 'claims for damages resulting from *physical* injury to persons or *physical* injury to tangible interests in property.' " *Id.* at 216, 626 P.2d at 178 (emphasis in original) (citations omitted). The court rejected the application of § 657-7, and opted instead for § 657-1(4) because the "nature of this claim was not the physical injury to property" and thus fell within the general limitations period for personal actions not specifically covered elsewhere. *Id.* at 216-17, 626 P.2d at 179. Nevertheless, personal injuries are covered elsewhere – in HRS § 657-7.

In *Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1 (1973), the court stated that a claim for legal malpractice concerned a "*non-physical* injury to an *intangible* interest of the plaintiff" and applied HRS § 657-1(1) based on an analogy to contract law. *Id.* at 170, 517 P.2d at 4.

PDF's argument would have us examine the "physical" or "non-physical" nature of the § 1983 action, hold that is "non-physical," and thus hold that because it is more analogous to the claims in *Au* and *Higa*, and HRS § 657-1 should be applied. However, the United States Supreme Court expressly rejected searching for the "most analogous" statute and directed that the personal injury statute should apply. *Owens*, 488 U.S. at 239-40. Even if the nature of the action were to be examined, it is clear that the Supreme Court meant *physical* injuries to persons. *See Wilson*, 471 U.S. at 276-77 (selection of personal injury statute was based on history of atrocities that concerned Congress in 1871, *i.e.* murders, whippings and lynchings).

The Queen's Medical Center, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982). Here, the alleged breach of trust arose out of the subject land exchange. The State and Campbell exchanged deeds on December 23, 1985, but the exchange did not become effective until the legislature failed to disapprove it by April 23, 1986. PDF fails to challenge the lower court's finding that PDF officers and members knew of the land exchange by November 1985. Thus, PDF knew of the exchange on or before its effective date and the cause of action accrued on, and the statute of limitations ran from, April 13, 1986.[15] The Complaint, filed on March 10, 1989, was untimely with respect to all claims under § 1983. Alternative grounds for the dismissal of these claims also merit discussion.

D. *Res Judicata* effect of *Ulaleo*

The Ninth Circuit's decision in *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), and the doctrine of *res judicata* bar relitigation of PDF's § 1983 claims. To explicate this holding, we first review the basic tenets of *res judicata*. This court has consistently recognized that:

> The judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject mater, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but

---

[15] PDF's Fourteenth amendment claims, brought under § 1983, also arise out of the subject land exchange. Therefore, this statute of limitations discussion is equally applicable to the fourteenth amendment claims.

> also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

Morneau v. Stark Enters., 56 Haw. 420, 422-23, 539 P.2d 472, 474-75 (1975) (quoting *Ellis v. Crocket*, 51 Haw. 45, 55,-451 P.2d 814, 822 (1969) (quoting *In re Bishop Estate*, 36 Haw. 403, 416 (1943)).

In *Morneau*, we also commented on the implications of the doctrine of collateral estoppel:

> Collateral estoppel is an aspect of *res judicata* which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies. . . . Collateral estoppel also precludes relitigation of facts or issues previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue.

56 Haw. at 423, 539 P.2d at 475 (citations omitted). These principles are tempered only by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues. *See Morneau*, 56 Haw. at 421-22, 539 P.2d at 474; *see also Allen v. McCurry*, 449 U.S. 90, 95 (1980) (noting a long recognized exception that "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case").

There is no question that PDF brought an official capacity suit in federal court against the defendant BLNR members on nearly identical § 1983 claims, although in the present case PDF no longer asks the court to void the

land exchange. PDF suggests, that because the Ninth Circuit did not reach the merits of the breach of trust claims in *Ulaleo*, there is no preclusive effect in this case. However, in dismissing that suit on eleventh amendment grounds, the court held that PDF sought retrospective relief against the State for the breach of the public lands trust. *Ulaleo*, 902 F.2d at 1398-1400. The finding that PDF sought retrospective relief is binding in this action. The significance of this binding effect is elucidated in our discussion of the State's sovereign immunity in Parts II.B. and II.C. of this opinion.

The Ninth Circuit ruling presents us with another facet of *res judicata*. That is, PDF may not escape the preclusive effect of the Ninth Circuit's ruling by advancing a different remedial theory. "The rule against splitting a cause of action is an aspect of *res judicata* and precludes the splitting of a single cause of action or an entire claim either as to the theory of recovery or the specific relief demanded." *Bolte v. Aits, Inc.*, 60 Haw. 58, 60, 587 P.2d 810, 812 (1978) (citations omitted). Therefore, we hold that PDF is barred by the doctrine of *res judicata* from asserting its breach of § 5(f) trust and fourteenth amendment claims brought under § 1983.

II. Other Breach of Trust Claims

In addition to its § 1983 claims, PDF asserts breach of trust claims under Hawaii law. PDF correctly argues that the State of Hawaii has acknowledged its fiduciary duties and obligations as trustee of the public lands trust in article XII, § 4 of the Hawaii Constitution. Article XVI, § 7

of the constitution mandates that the § 5(f) trust provisions "shall be complied with by appropriate legislation." The decision of this court will not render these provisions meaningless and will not leave the people of Hawaii without the means to held their government to these promises. Therefore, we hold that PDF has a government to these promises. Therefore, we hold that PDF has a right to bring suit under the Hawaii Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust. We further hold that PDF is not seeking to prospectively enjoin a constitutional violation in this case, but would have us turn back the clock and examine actions already taken by the State. The doctrine of sovereign immunity deters judges from this course in state as well as federal court.

A. Right to Sue Under the Hawaii Constitution

The State argues that, because the Ninth Circuit ruled that the Admission Act creates no private implied right of action, there can be no private right of action to enforce the terms of the § 5(f) trust under Hawaii law. *See Keaukaha I*, 588 F.2d 1216 (1978). We disagree. We have held, in a variety of contexts, that this court is not precluded from finding that the Hawaii Constitution affords greater protection than required by similar federal constitutional or statutory provisions. *See e.g., State v. Kam*, 69 Haw. 483, 748 P.2d 372 (1988); *Hawaii Housing Authority v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985); *State v. Tanaka*, 67 Haw. 658, 701 P.2d 1274 (1985); and *State v. Russo*, 67 Haw. 126, 681 P.2d 553 (1984), *appeal after remand*, 69 Haw. 72, 734 P.2d 156 (1987).

First, we review the grounds for the Ninth Circuit's ruling in *Keaukaha I*. In reaching its conclusion that the Admission Act does not imply a private cause of action, the court analyzed the United Sates Supreme Court's interpretation of the Rail Passenger Service Act which permits suits by the United States Attorney General, or in some cases, railroad employees. *Keaukaha I*, 588 F.2d at 1220-21 (citing, *inter alia, National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974)). The Supreme Court held that because the Rail Act creates only a public cause of action and a narrow private cause of action, the legislature intended these to provide the exclusive remedies. *Id.* This presumption of an exclusive remedy, known as the *expressio unius* principle, yields to both legislative intent and the effectuation of the purposes of a statute. *Id.* at 1221 (citations omitted).

The Ninth Circuit also applied the four factors articulated in *Cort v. Ash*, 422 U.S. 66 (1975), to the Admission Act. The first element, that plaintiff is a "member of the 'class for whose especial benefit the statute was enacted,' " was met. *Id.* at 1223. The second element, an indication of explicit or implicit legislative intent, was found to be lacking – the court applied the *expressio unius* presumption[16] and noted the "unusual" use of a state's admission act to create a right to sue. *Id.* at 1223. The third element, consistency with the underlying statutory

---

[16] The court found that given the lengthy consideration that Congress gave the Hawaii Admission Act, the *expressio unius* presumption was particularly appropriate. 588 F.2d at 1223 (Admission Act first proposed in 1919, 23 hearings, over 6,600 pages of testimony and exhibits, and more than 850 witnesses).

scheme, was thought to be a "close question," but was found not to support a private cause of action because the court saw "no federal purpose to be served by reading a private cause of action into the Admission Act." *Id.* at 1224. The fourth element, whether the cause of action is one "traditionally relegated to the States, in an area basically the concern of the States," was "easily" concluded to militate against implying a private right to sue. *Id.* at 1222, 1224. As we noted earlier, the court found that action to be "a matter of state concern" and held it to be "most appropriate for Hawaii's laws and judicial system to deal with it." *Id.* at 1224.

We are of the view that, while these reasons were compelling in the context of the enforceability of a federal statute, they do not support a similar finding with respect to the enforcement of article XII, § 4 of the Hawaii Constitution. *Cf. Huihui v. Shimoda*, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982) ("[I]t is our obligation to interpret and enforce the state constitution as the highest court of this sovereign state 'not in total disregard of federal interpretations . . . , but with reference to the wisdom of adopting these interpretations for our state.' "). Article XII, § 4 was added to the Hawaii Constitution to expressly recognize the trust purposes and trust beneficiaries of the § 5(f) trust, clarifying that the State's trust obligations extend beyond the Hawaiian Homes Land Trust. *See* Stand. Comm. Rep. No. 59, Constitutional Convention of 1978, 2-3. And, despite the Ninth Circuit's findings that no purpose would be served by allowing private enforcement of the ceded land trust in federal court, we find that protecting the res of the public lands trust, thereby enforcing the mandates of our constitution,

is appropriate in our state courts. This consideration undermines the argument that access to an enforcement remedy for breach of trust should be held exclusively by the United States Attorney General.

We are also guided by our earlier decisions concerning lands held in public trust. In *Kapiolani Park Preservation Society v. City & County of Honolulu*, 69 Haw. 569, 751 P.2d 1022 (1989), we held that members of the public, as trust beneficiaries, could sue to prevent the trustee, a government agency, from disposing of trust lands through leases or deeds in contravention of the terms of a charitable trust.[17] In *Kapiolani Park*, the court found that: (1) a government agency (the City) was the trustee of a public charitable trust; (2) the trustee did not file periodic accountings; (3) the trustee would not seek instructions of the court as to its duties; (4) a genuine controversy existed as to the trustee's power to enter into the lease transaction; and (5) the attorney general, as *parens patriae*, chose to support the City's actions, abandoning the

---

[17] *See also Natatorium Preservation Committee v. Edelstein*, 55 Haw. 55, 515 P.2d 621 (1973), wherein plaintiffs brought suit to (prospectively) enjoin the destruction of the Natatorium in violation of the executive order setting aside the public lands for the Natatorium and in violation of the procedural requirements of HRS § 171-11. Although a subsequent amendment to HRS § 171-11 superseded the court's holding with respect to the operation of that provision, the relevance of that case to the present controversy is unchanged. In effect, the *Natatorium* decision stands for the proposition that citizens can bring suit for an injunction against the government agencies charged with the management of public lands when those agencies seek to dispose of the public lands in violation of the statutes governing their management and disposition.

defense of the possible rights of the public. *Id.* at 572, 751 P.2d at 1025. Under those circumstances, we held that unless members of the public could bring the matter to the attention of the court,

> "the citizens of this State would be left without protection, or a remedy . . . [and] the City, with the concurrence of the attorney general, would be free to dispose, by lease or deed, of all, or part of, the trust comprising Kapiolani Park, as it chose, without the citizens of the City and State having any recourse to the courts."

Id.

Although the case before us involves the ceded lands trust, rather than a charitable trust, the parallels are unmistakable.[18] Here, we have a situation where the

---

[18] *See also Ahuna v. Department of Haw'n Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982). This case involved the Department's duties as trustee of Hawaiian home lands. The issue of whether the Hawaiian Homes Commission Act, which is incorporated into article XII, § 2 of the Hawaii Constitution, provides a private right of action was not addressed, because it was raised for the first time on appeal. *Id.* at 332-33, 640 P.2d at 1165. Nevertheless, the court determined the fiduciary duties that the government, as trustee, owed to the native Hawaiian beneficiaries of the trust. The court held, in part, that "the conduct of the government as trustee is measured by the same strict standards applicable to private trustees." *Id.* at 339, 640 P.2d at 1169 (citations omitted). The court applied this high standard of fiduciary duty to the government in deciding whether: (1) the trustee administered the trust solely in the interest of the beneficiaries; and (2) whether the trustee used reasonable skill and care to make trust property productive. *Id.* at 340, 640 P.2d at 1169. The court agreed with the Department that "a trustee must deal impartially when there is more than one beneficiary," but held

agency charged with the administration of a trust held for the benefit of native Hawaiians and members of the public has purportedly disposed of trust assets in violation of trust provisions and, if we were to adopt the position of the State, no one in the State of Hawaii would have the right to bring the matter before Hawaii's courts. As we said in *Kapiolani Park*, "[s]uch a result is contrary to all principles of equity and shocking to the conscience of the court." *Id.* at 573, 751 P.2d at 1025. Leaving aside for the moment the question of whether we can now review the State's consummated acts, we are of the firm conviction that our courts must be available to the citizens of Hawaii to avert such a purported breach of public trust.

We find that the actions of state officials, acting in their official capacities, should not be invulnerable to constitutional scrutiny. Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions, and the citizens of the state must have a means to mandate compliance. This is not to say, however, that article XII, § 4 creates a waiver of sovereign immunity such that money damages are available. *See Figueroa v. State*, 61 Haw. 369, 604 P.2d 1198 (1979) (although a constitutional provision

---

that the trustees "failed to sufficiently demonstrate that they considered the interests of all beneficiaries." *Id.*, 640 P.2d at 1170.

The State owes this same high standard to the beneficiaries of the ceded lands trust and, as stated in the text, the beneficiaries of this trust should not be left powerless to prevent the State from allegedly neglecting its obligations.

establishes enforceable rights or duties, it does not necessarily create a waiver of sovereign immunity). Nevertheless, as discussed in the following section, sovereign immunity may not always provide a defense for state officials when their actions are attacked as being unconstitutional. *See, e.g., W.H. Greenwell, Ltd. v. Department of Land and Natural Resources,* 50 Haw. 207, 209, 436 P.2d 527 (1968). Thus, we hold that PDF, whose members are beneficiaries of the trust, may bring suit for the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawaii constitutional and statutory provisions governing the public lands trust.

B. Sovereign Immunity

PDF argues that sovereign immunity is not a bar to suit for injunctive relief when state officials acting in their official capacities act *ultra vires* of state and federal law. While we agree with this legal proposition, we disagree with PDF's further argument that the Ninth Circuit's rulings on the strictures of the eleventh amendment are not relevant to our own principles of sovereign immunity. On the contrary, the eleventh amendment is the federal constitutional embracement of the common law doctrine of sovereign immunity;[19] it makes the doctrine applicable

---

[19] Although the language of the eleventh amendment expressly governs actions against a state brought by citizens of another state, the U.S. Supreme Court has long held that the amendment also bars suits against a state by its own citizens. *See Hans v. Louisiana,* 134 U.S. 1 (1890); *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47 (1944); *Edelman v. Jordan,* 415 U.S. 651

to the federal courts. *See, e.g., Will v. Michigan Dept. of State Police,* 491 U.S. 58, 67 (1989) (citations omitted) (In discussing whether Congress intended to abrogate eleventh amendment immunities in § 1983 actions, the Court stated that "members of the 42d Congress were familiar with common-law principles . . . [and t]he doctrine of sovereign immunity was a familiar doctrine at common law."); *Green v. Mansour,* 474 U.S. 64, 68 (1985) (citations omitted) ("The Eleventh Amendment confirms that 'fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.' ").

In *W.H. Greenwell, Ltd. v. Department of Land and Natural Resources,* 50 Haw. 207, 436 P.2d 527 (1968), we discussed Hawaii's sovereign immunity doctrine in a suit to enjoin DLNR's planned release of axis deer on the Big Island, allegedly in violation of the Plaintiff's rights under the state and federal constitutions. The court held that:

> It is the unquestioned rule that the State cannot be sued without its consent or waiver of its immunity in matters "involving the enforcement of contracts, treasury liability for tort, and the adjudication of interest [sic] in property which has come unsullied by tort into the bosom of government." . . . [However,] sovereign immunity may not be invoked as a defense by state

---

(1973). The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."
U.S. Const. amend. XI.

> officials who comprise an executive department of government when their action is attacked as being unconstitutional.

Id. at 208-09, 436 P.2d at 528 (citations omitted). Nor will sovereign immunity bar suits to enjoin state officials from violating state statutes. *See, e.g., Natatorium Preservation Committee v. Edelstein,* 55 Haw. 55, 515 P.2d 621 (1973).

Subsequent decisions have further illustrated that the sovereign State is immune from suit for money damages, except where there has been a "clear relinquishment" of immunity and the State has consented to be sued. *See Washington v. Fireman's Fund Ins. Co.,* 68 Haw. 192, 198, 708 P.2d 129, 134 (1985), *cert denied,* 476 U.S. 1169 (1986) (Acknowledging its earlier ruling in *Greenwell,* the court held that sovereign immunity was a bar to plaintiff's action because it "does not involve an action seeking only to enjoin state officials from acting unconstitutionally." (citations omitted)); *Big Island Small Ranchers Ass'n v. State,* 60 Haw. 228, 236, 558 P.2d 430, 436 (1978) (Plaintiffs' chapter 480 damages claims were held to be barred by sovereign immunity, because "the legislature has not made Chapter 480 explicitly applicable to the State, and since none of the allegations in the complaint claim that the State has consented to be sued upon this chapter, appellants can claim no relief under this theory." *Makanui v. Department of Educ.,* 6 Haw. App. 397, 405-07, 721 P.2d 165, 171-72 (1986) (The ICA held that Hawaii had not waived its sovereign immunity from § 1983 damages liability, and those claims against the state and state officials in their official capacities were therefore

barred.[20] *See also* HRS chs. 661, 662, 673 and 674 (waiving the State's sovereign immunity in certain cases).

This court has not previously tested the scope of the exception to the sovereign immunity doctrine recognized in *Greenwell*. We must do so in this case because, on its face, PDF's complaint requests only injunctive and declaratory relief, and not damages, against state officials acting in their official capacities. The *Greenwell* exception has its genesis in *Ex parte Young*, 209 U.S. 123 (1908), which first held that the eleventh amendment does not bar a suit to enjoin as unconstitutional a state official's actions. *See Greenwell*, 50 Haw. at 209, 436 P.2d at 528. *Young* has been the subject of many subsequent decisions to which we turn for guidance.

The rule in *Young*, which we adopt, makes an important distinction between prospective and retrospective

---

[20] *Accord Will v. Michigan Dept of Police*, 491 U.S. 58 (1989). Noting that the eleventh amendment does not apply in state courts, the United States Supreme Court addressed the question of whether a state is a "person" under § 1983. The Court held that a state is not a person within the meaning of § 1983, nor is a state official, when acting in his official capacity, because such a suit is really a suit against the official's office, which is a suit against the state. Nevertheless, the Court twice distinguished *Will* from cases seeking only injunctive relief: (1) "In *Jefferson County*, the Court held that States were persons . . . [b]ut the plaintiff there was seeking only injunctive relief and not damages against the State defendant . . . ," 491 U.S. 64-65 n.5; and (2) "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official capacity actions for prospective relief are not treated as actions against the State.' " 491 U.S. at 71.n.10 (citations omitted).

relief.[21] If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 278 (1985); *Green v. Mansour*, 474 U.S. 64, 68 (1985). This is true "even though accompanied by a substantial ancillary effect on the state treasury." *Papasan*, 478 U.S. at 278 (citations omitted).[22] However, relief that

---

[21] Application of the rule in *Young* differs slightly in state and federal court because the federal courts are primarily concerned with vindicating federal rights and holding state officials "responsible to 'the supreme authority of the United States.' " *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160). In federal court, an eleventh amendment defense might prevail where officials are alleged to be violating state law alone. *Id.* at 104-06. In state court, we are equally concerned with violations of Hawaii law, whether constitutional or statutory, and sovereign immunity will not preclude suits brought to enjoin such illegalities.

[22] In *Edelman v. Jordan*, 415 U.S. 651 (1973), the Supreme Court discussed two cases in which injunctive relief was found to have a permissible, ancillary effect on state treasuries:

> [T]he fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous conduct. Such an ancillary effect on the state treasury is often an inevitable consequence of the principle announced in *Ex parte Young, supra*.

Id. at 667-68 (referring to *Graham v. Richardson*, 403 U.S. 365 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970), cases in which welfare officials were enjoined from denying or terminating certain benefits). In *Edelman*, the Court held that the eleventh amendment barred "equitable restitution" for improperly

is "tantamount to an award of damages for a past violation of . . . law, even though styled as something else," is barred by sovereign immunity. *Id.*

As the Ninth Circuit observed in *Ulaleo*, "[s]imply asking for injunctive relief and not damages *does not* clear the path for suit. The Supreme Court has recognized that the difference between retrospective and prospective relief 'will not in many instances be that between day and night.' " *Ulaleo*, 902 F.2d at 1399 (quoting *Edelman v. Jordan*, 415 U.S. 651, 667 (1973)). In the case before us, PDF has styled its prayer for relief as one for declaratory and injunctive relief, yet the question remains whether the effect on the state treasury would be "ancillary" or would amount to virtual compensation for the past misconduct of state officials.

The claims for restoration of the Puna lands, via a constructive trust, are comparable to the claims that the U.S. Supreme Court held to be retrospective in *Papasan*, in which the plaintiffs argued that the sale of certain school trust lands in the 1850's, and the unwise investment of the proceeds, had violated the trust obligation to hold those lands for the benefit of the area's schoolchildren. 478 U.S. at 274. Plaintiffs sought: (1) a declaration that the state legislation implementing the land sales was void and unenforceable; (2) establishment of a fund to be held in trust for plaintiffs' benefit; or, alternatively, (3) other

---

denied benefits, because it was indistinguishable from an award of damages. 415 US. at 669-71.

lands of the same value to be made available to the plaintiffs. *Id.* at 274-75.

The plaintiffs in *Papasan* argued that they only sought a prospective, injunctive remedy by requiring the state officials to provide appropriate trust income. *Id.* at 279. The Court held that "continuing payment of the income from the lost corpus is essentially equivalent in economic terms to a one-time restoration of the lost corpus" and no different than a monetary award, thus violative of the eleventh amendment. *Id.* at 281.

In the instant case, PDF's request that the trust status of the exchanged lands be restored by means of a constructive trust is "essentially equivalent" to a nullification of the exchange and the return of the exchanged lands to the trust res. The effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands now held by Campbell would require that the State to compensate Campbell for its property. *See* U.S. Const. amend. V; Haw. Const. art. I, § 20. We therefore hold that PDF's requested relief is, in effect, a request for compensation for the past actions of the BLNR members. All of the PDF's claims against the defendant state officials which are based on the alleged illegality of the subject land exchange, on either constitutional or statutory grounds, are barred by the State's sovereign immunity.[23]

---

[23] The affected claims include: (1) breach of trust claims under article XII, § 4; (2) due process claims under article I, § 5; (3) violation of article XII, § 7 by the relinquishment of state lands; (4) violation of HRS §§ 171-26 and 171-50; and (5) violation of HRS chapter 195. This opinion in no way implies that this

C. *Collateral Estoppel Effect of Ulaleo*

In addition to our own conclusion that PDF seeks retrospective relief which is barred by sovereign immunity, we are bound by the Ninth Circuit's adjudication in *Ulaleo,* in which the Ninth Circuit held:

> The Complaint is that sometime in the past, the BLNR undertook an action, the land exchange, which allegedly injured the plaintiffs by violating the trust of which the plaintiffs are beneficiaries. . . . The immediate relief plaintiffs seek would require the state to purchase the lands from its present holder by way of cash or other land. We hold that to grant the requested relief would be a retrospective remedy. . . . If the trust duty was violated, it happened when the BLNR executed the exchange.

Ulaleo, 902 F.2d at 1399-1400. Thus, the judgment of a court of competent jurisdiction has previously determined the retrospective nature of PDF's "illegal land exchange" claims, and the state courts are precluded from relitigating this issue in the context of PDF's state law claims. *See, e.g., Morneau v. Stark Enters.,* 56 Haw. at 423,

---

court condones the actions of the BLNR in this case. For example, were the questions properly before us, we might well have occasion to hold that: (1) chapter 195 provides greater protection for NARS designated public lands than the more general public lands provisions in chapter 171; (2) that § 195-1 declares the legislative intent to set aside and administer certain "unique natural assets" solely for the purposes of protecting and preserving them for future generations; (3) that designated lands were to be preserved "in perpetuity;" and (4) that until the 1987 amendments to this chapter, there was no provision allowing alienation of NARS land.

539 P.2d at 475 (collateral estoppel precludes the relitigation of an issue which was decided in a prior suit on a different claim). PDF had a "full and fair opportunity" to argue that it was in fact seeking prospective relief, and reframing its prayer for relief does not entitle it to reargue claims based on the allegedly illegal land exchange. *See Bolte v. Aits, Inc.*, 60 Haw. 58, 587 P.2d 810; *see also Allen v. McCurry*, 449 U.S. 90 (1980) (holding that a federal court cannot relitigate an issue already decided in state court when the party against whom the earlier decision is asserted had a full and fair opportunity to litigate that issue in the earlier case).[24]

In light of our rulings that PDF's breach of trust claims are barred by sovereign immunity and the preclusive effect of *Ulaleo*, we need not reach the question of whether this court's decision in *Dedman v. BLNR*, 69 Haw. 255, 740 P.2d 28 (1987), also bars relitigation of claims arising out of the land exchange.[25]

---

[24] We recognize that the PDF's pendent state law claims were not fully litigated in federal court; rather they were barred because, after the § 1983 claims were dismissed, the justification under *Ex parte Young* for adjudicating them in federal court no longer existed. *See* 902 F.2d at 1400; *see also supra* n.21.

[25] Although PDF was not a party in *Dedman*, two of PDF's founding members were plaintiffs in that case and the defendants here argue that PDF and the *Dedman* plaintiffs are "in privity" with respect to the issues before the court. For a discussion of the privity issue, *see, e.g., United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980); *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980).

D. Indispensable Parties

Campbell and True argue that the State is an indispensable party to any claim arising out of the land exchange. We agree. First, as alleged by the defendants, PDF has failed to appeal from the lower court's conclusion of law ruling that the State is an indispensable party to the breach of trust claims against Campbell and True. Issues not properly raised on appeal will be deemed to be waived. *Mahiai v. Suwa*, 69 Haw. 349, 354, 742 P.2d 359, 364 (1987); *Meyer v. City & County of Honolulu*, 6 Haw. App. 505, 513-14, 729 P.2d 388, 395 *aff'd in part, rev'd in part on other grounds*, 69 Haw. 8, 731 P.2d 149 (1986). Additionally, we find that there is no adequate remedy available for the alleged breaches of trust absent the trustee-State's participation.

III. *Kalipi* Rights

PDF argues that article XII, § 7 of the Hawaii Constitution was violated in two ways: (1) by the *relinquishment of state lands* on which native Hawaiians customarily and traditionally exercised subsistence, cultural and religious practices; and (2) by the continued *denial of access* into Wao Kele 'O Puna to native Hawaiian PDF members who seek access for customarily and traditionally exercised subsistence, cultural and religious practices.

The former claim, which arises out of the land exchange between the State and Campbell, is barred by the State's sovereign immunity. *See* Part II.B., *supra*. Regardless of its constitutional or statutory basis, any claim seeking to restore trust beneficiaries to the position they occupied prior to the exchange is retrospective in

nature and cannot be brought against the State.[26] The latter claim, however, is independent of the land exchange and merits further analysis.

A. Standing

PDF argues that it has standing to bring suit on behalf of its native Hawaiian members under article XII, § 7 of the Hawaii Constitution. We agree for many of the same reasons that we held that PDF could bring breach of trust claims on behalf of its members. *See* Part I.B., *supra*.

It is undisputed that the rights of native Hawaiians are a matter of great public concern in Hawaii. This court has repeatedly demonstrated its fundamental policy that Hawaii's state courts should provide a forum for cases raising issues of broad public interest,[27] and that the

---

[26] Additionally, as should be apparent from the ensuing discussion of article XII, § 7 and *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982), the "Kalipi rights" of a native Hawaiian do not depend on who owns the subject land. In other words, if a native Hawaiian has the right to enter the land of another, the transfer of ownership *alone* does not extinguish those native Hawaiian rights. Concomitantly, the existence of native Hawaiian rights to enter a particular parcel of land does not burden a landowner's right to transfer his or her interest in the land.

[27] This policy is, of course, limited to judicially cognizable claims. For example, we will not hear claims lacking allegations of concrete injuries and merely asserting the value preferences of the plaintiffs. *See, e.g., Hawaii's Thousand Friends*, 70 Haw. at 283-84, 768 P.2d at 1299. Nor shall we try to settle "political questions" which must be resolved by the political branches of government. *See, e.g., Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446, *cert. denied*, 484 U.S. 898

judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court. *Life of the Land v. The Land Use Comm'n*, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981) ("Our touchstone remains 'the needs of justice.' "); *see also Akau v. Olohana Corp.*, 65 Haw. 260, 652 P.2d 1130 (1982); *In re Applic. of Haw'n Elec. Co., Inc.*, 56 Haw. 260, 535 P.2d 1102 (1975).

As discussed earlier in this opinion, the needs of justice can be served only by recognizing plaintiffs that have a sufficient personal stake in the outcome of the litigation. This is measured by the three-part "injury in fact" test set out in *Akau*, and followed in *Hawaii's Thousand Friends*. *Akau*, 65 Haw. at 389, 652 P.2d at 1134-35 (citations omitted); *Hawaii's Thousand Friends*, 70 Haw. at 283, 768 P.2d at 1299. Applying this test to PDF's article XII, § 7 claim, we find that PDF has adequately alleged that: (1) its members include native Hawaiians who are being injured by their exclusion from the undeveloped areas of the land now held by Campbell and True;[28] (2) the injuries are traceable to the alleged violation of their

---

(1987); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (cited in *Board of Educ. v. Waihee*, 70 Haw. 253, 768 P.2d 1279 (1989)).

[28] Campbell argues on appeal that PDF fails to allege that its membership includes persons who are of fifty percent or more Hawaiian blood *and* who have gone to Wao Kele 'O Puna and the Puna Forest Reserve in the exercise of traditional and customary rights. However, Campbell does not challenge the trial court's finding of fact that PDF alleges, and supports by affidavit, that "its membership include[s] persons who are of fifty percent (50%) or more Hawaiian blood who live in certain ahupua'a abutting but not in Wao Kele 'O Puna." We will not disturb this finding. *See Mahiai*, 69 Haw. at 354, 742 P.2d at 364.

"*Kalipi* rights;" and (3) injunctive relief is likely to remedy the injuries by requiring defendants to allow native Hawaiians access to undeveloped areas of the exchanged lands.[29] Therefore, we hold that PDF, a non-profit corporation whose stated purpose is to perpetuate Hawaiian religion and culture, has standing to assert a violation of article XII, § 7 on behalf of its members.

B. Extension of *Kalipi*

PDF challenges the circuit court's dismissal of its claim that PDF's native Hawaiian members were entitled under Article XII, § 7 to enter Wao Kele 'O Puna and the Puna Forest Reserve to exercise traditional and customary rights. The basis of PDF's claim is that Wao Kele 'O Puna historically served as a common gathering area which could be utilized by tenants who resided in ahupua'a abutting Wao Kele 'O Puna. Accordingly, PDF argues that its members should not need to establish that they are "lawful occupants" of Wao Kele 'O Puna, although they must establish that they are tenants of

---

[29] Although not essential to our holding, we also observe that "the needs of justice" in this particular case are best served by allowing PDF to maintain standing in light of the lower court's seemingly contradictory rulings in this case. On November 11, 1990, the court denied Emily Naeole's motion to intervene because her "interests and claims are well-represented by the Pele Defense Fund." Nevertheless, on February 14, 1991, the court concluded that "PDF further failed to satisfy all or even a part of the three-part test for determining whether it had standing to bring the pending suit on behalf of its members." A person obviously cannot be "well-represented" by one who lacks standing to bring claims on that person's behalf.

ahupua'a abutting Wao Kele 'O Puna and have traditionally used Wao Kele 'O Puna for gathering and other native Hawaiian practices.

To determine the efficacy of this claim, we first review article XII, § 7 and the landmark opinion written by Chief Justice Richardson in *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982). *Kalipi* defined the rudiments of native Hawaiian rights protected by article XII, § 7 commonly known as "*Kalipi* rights." We now further explicate the scope of these rights under the Hawaii Constitution. Article XII, § 7 provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Haw. Const. art. XII, § 7 (1978).

We first address this constitutional provision in *Kalipi*, 66 Haw. 1, 656 P.2d 745. Kalipi sought to exercise traditional gathering rights in the Molokai ahupua'a of Ohia in which he owned a houselot. *Id.* at 3, 656 P.2d at 747.[30] Kalipi did not reside on the property, although he lived in the nearby Keawenui ahupua'a. *Id.* Kalipi turned to three sources to support his claimed rights: (1) HRS

---

[30] Kalipi also sought to exercise traditional gathering rights in the ahupua'a of Manawai in which he owned a taro patch. *Kalipi*, 66 Haw. at 3, 656 P.2d at 747. For discussion purposes, we refer only to rights associated with the houselot in the Ohia ahupua'a.

§ 7-1;[31] (2) HRS § 1-1;[32] and (3) the "kuleana" reservation in the title to the lands in question. *Id.* at 4, 656 P.2d at 747. The court looked to article XII, § 7 for its "obligation to preserve and enforce such traditional rights." *Id.* at 4-5, 656 P.2d at 748.

We held that HRS § 7-1 contains two types of rights: "gathering rights which are specifically limited and enumerated, and rights to access and water which are framed in general terms." *Id.* at 5, 656 P.2d at 748. With respect to these rights, we stated that "lawful occupants of an ahupuaa may, for the purposes of practicing native

---

[31] HRS § 7-1 (1985), a statute initially passed in 1851, provides:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and roads shall be free to all, on lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

[32] HRS § 1-1 (1985) (emphasis added) provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage;* provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

Hawaiian customs and traditions, enter undeveloped lands within the ahupuaa to gather those items enumerated in the statute." *Id.* at 7-8, 656 P.2d at 749. The "undeveloped lands" limitation was imposed by the court to balance the concept of land ownership with that of native rights. *Id.* Because Kalipi asserted his rights based on ownership of land and not residence in the ahupua'a, we held that he was not entitled to exercise native gathering rights in Ohia. *Id.* at 9, 656 P.2d at 750.

We further held that HRS § 1-1's "Hawaiian usage" clause may establish certain customary Hawaiian rights beyond those found in HRS § 7-1. *Id.* at 9-10, 656 P.2d at 750. Thus, we "believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." *Id.* at 10, 656 P.2d at 751. Noting testimony that "there have continued in certain ahupuaa a range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in § 7-1," we held that HRS § 1-1 insures the continuance of these enduring practices "for so long as no actual harm is done thereby." *Id.*

With respect to Kalipi we held, that, regardless of the source of his asserted rights, he was not entitled to exercise them because he did not live in the ahupua'a in which he sought to assert his claimed rights. *Id.* at 13, 656 P.2d at 752.

Like Kalipi, PDF members assert native Hawaiian rights based on article XII, § 7 and HRS § 1-1 in an

ahupua'a other than the ones in which they reside. Unlike Kalipi, PDF members claim these rights based on the traditional access and gathering patterns of native Hawaiians in the Puna region. Because Kalipi based his claims entirely on land ownership, rather than on the practiced customs of Hawaiians on Molokai, the issue facing us is somewhat different from the issue in *Kalipi*. In *Kalipi*, we foresaw that "[t]he precise nature and scope of rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case." 66 Haw. at 12, 656 P.2d at 752.

Thus, we upheld the rights of native Hawaiians to enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes so long as no actual harm was done by the practice. As found by the *Kalipi* court, and reported by the Constitutional Convention committee that drafted article XII, § 7, these rights are associated with residency within a particular ahupua'a. *See* Stand. Comm. Rep. No. 57, reprinted in 1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, 637.[33]

The Committee on Hawaiian Ãffairs added what is now article XII, § 7 to reaffirm customarily and traditionally exercised rights of native Hawaiians, while giving the State the power to regulate these rights. *Id.* at 639.

---

[33] The committee reported that "[a]though [sic] a tenant may not own any land in the ahupua'a, since these rights are personal in nature, as a resident of the ahupua'a, he may assert any traditional and customary rights necessary for subsistence, cultural or religious purposes." 1 *Proceedings, supra* at 640.

Although these rights were primarily associated with tenancy within a particular ahupua'a, the committee report explicitly states that the new section "reaffirms *all* rights customarily and traditionally held by ancient Hawaiians." *Id.* at 640 (emphasis added). The committee contemplated that some traditional rights might extend beyond the ahupua'a; "[f]or instance, it was customary for a Hawaiian to use trails outside the ahupua'a in which he lived to get to another part of the Island." *Id.* The committee intended this provision to protect the broadest possible spectrum of native rights:

> Your Committee also decided that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions. Your Committee did not intend to remove or eliminate any statutorily recognized rights or any rights of native Hawaiians from consideration under this section, but rather your Committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. Your Committee did not intend to have the section narrowly construed or ignored by the Court. Your Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.

Id. at 640 (emphasis added).

If, as argued by PDF,[34] the customary and traditional rights associated with tenancy in an ahupua'a extended beyond the boundaries of the ahupua'a, then article XII, § 7 protects those rights as well. The drafters of the constitutional amendment emphasized that *all* such rights were reaffirmed and that they did not intend for the provision to be narrowly construed. We therefore hold that native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.

PDF has presented evidence supporting the contention that the access and gathering patterns of tenants in Puna do not appear to have conformed to the usual notion that tenants exercised such rights only within the boundaries of a given ahupua'a. Affidavits suggest that Puna region ahupua'a tenants accessed all portions of the Puna Forest Reserve for hunting and gathering, and were not limited to just the narrow corridor of their ahupua'a. The practice of accessing the area as a common area for gathering and hunting by tenants of the Puna district may have commenced from the time of the Great Mahele and Kuleana Acts. One affiant testified that early trails accessed the Puna Forest Reserve from many ahupua'a, the lava tube extending into the Puna Forest Reserve extends across several ahupua'a and has entry points in

---

[34] These arguments are supported by the affidavits of Dr. Davianna McGregor, and Assistant Professor of Ethnic Studies at University of Hawaii at Manoa, and Emily Naeole and Clarence Hauanio, PDF members of more than 50% Hawaiian blood and residents of Maku'u and Kalapana, ahupua'a abutting Wao Kele 'O Puna.

more than one ahupua'a, and this area was associated with Pele and her family,[35] and not with any particular ahupua'a.

Based on the evidence before the trial court, we find that there are genuine issues of material fact with respect to PDF's claim under article XII, § 7.[36] If it can be shown that Wao Kele 'O Puna was a traditional gathering area utilized by the tenants of the abutting ahupua'a, and that the other requirements of *Kalipi* are met in this case, then PDF members such as Ms. Naeole may have a right to enter the undeveloped areas of the exchanged lands to exercise their traditional practices. At a full trial on the merits, PDF will have an opportunity to develop the facts and present evidence to support its claim. Therefore, the summary judgment is reversed and the matter remanded for trial on this issue.

IV. Waiver of the Right to Free Association

PDF does not raise as error the circuit court's conclusion that PDF's right to free association under the first amendment of the U.S. and Hawaii Constitutions has not been violated. We have previously held that an appellant waives or abandons any challenge to matters not raised on appeal. *Mahiai v. Suwa*, 69 Haw. 349, 354, 742 P.2d 349

---

[35] Pele is an akua or goddess.

[36] We reiterate our early holding that article XII, § 7 *does not* require the preservation of Wao Kele 'O Puna and the (former) Puna Forest Reserve lands in their natural state. *Kalipi* rights only guarantee access to undeveloped land, under the specified circumstances, but they do not ensure that any particular lands will be held for the exercise of native Hawaiian customs.

(1987); *Meyer v. City & County of Honolulu*, 6 Haw. App. 505, 513-14, 729 P.2d 388, 395 *aff'd in part, rev'd in part on other grounds*, 69 Haw. 8, 731 P.2d 149 (1986). Thus, PDF has waived its first amendment arguments.

V. Conclusion

In summary, we reverse in part and remand for trial on the claim alleging that defendants violated article XII, § 7 by the continued denial of access into the undeveloped areas of Wao Kele ʻO Puna and other exchanged lands to native Hawaiian PDF members who seek access for customarily and traditionally exercised subsistence, cultural and religious practices. We affirm the judgment of the lower court in all other respects for the reasons set forth in this opinion.

/s/ Illegible
/s/ Illegible
/s/ Illegible
/s/ Illegible

APPENDIX B

WARREN PRICE, III 1212
Attorney General of Hawaii

WILLIAM M. TAM 1887
Deputy Attorney General
Department of the Attorney
General, State of Hawaii
Room 300, Kekuanao'a Building
465 South King Street
Honolulu, Hawaii 96813
Telephone: 548-8931

Attorneys for Defendants
WILLIAM PATY, in his capacity as
Chairman of the Board of Land and
Natural Resources, State of Hawaii,
MOSES KEALOHA, DOUGLAS ING, LEONARD
ZALOPANY, JOHN ARISUMI and HERBERT
ARATA, in their capacity as members
of the Board of Land and Natural Resources

(Filed May 20, 1991)

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PELE DEFENSE FUND, Plaintiff, vs. WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, MOSES KEALOHA, DOUGLAS ING, LEONARD ZALOPANY, JOHN ARISUMI and HERBERT ARATA, in their capacity as members of the Board of Land and Natural Resources, The Estate of JAMES CAMPBELL, Deceased, FRED E. TROTTER, W. H. McVAY, P. R. CASSIDAY, and HERBERT C. CORNUELLE, in their fiduciary capacity as Trustees under the Will of James Campbell, Deceased; TRUE ENERGY GEOTHERMAL CORP., TRUE GEOTHERMAL DRILLING CO., and MID-PACIFIC GEOTHERMAL, INC., Defendants.	CIVIL No. 89-089 (Hilo) (Declaratory Judgment/ Injunction) FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT DATE: February 14, 1991 TIME: 8:30 A.M. JUDGE: ERNEST H. KUBOTA

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT

Plaintiff PELE DEFENSE FUND ("Plaintiff PDF") filed this suit on March 10, 1989 challenging the 1985 land exchange between the State of Hawaii and Defendant THE ESTATE of JAMES CAMPBELL, Deceased and the geothermal activities in the Kilauea Middle East Rift Zone ("KMERZ") in Puna, Hawaii. The issues presented in the present action as well as those in the prior administrative and judical [sic] proceedings, arise from the Board of Land and Natural Resources' approval of the 1985 land exchange, the Geothermal Resource Subzone ("GRS") (1985) and Conservation District Use Permits ("CDUP") (1986) in the KMERZ area.

On January 30, 1991, Defendants WILLIAM PATY, in his capacity as Chairperson of the Board of Land and Natural Resources, State of Hawaii (hereinafter "BLNR"), MOSES KEALOHA, DOUGLAS ING, LEONARD ZALOPANY, JOHN ARISUMI and HERBERT ARATA, (hereinafter "Defendant State Officials"), Defendants THE ESTATE OF JAMES CAMPBELL, Deceased, FRED E. TROTTER, W. H. McVAY, P. R. CASSIDAY, and HERBERT C. CORNUELLE, in their fiduciary capacity as Trustees under the Will of James Campbell, Deceased, (hereinafter "Defendant Campbell") and Defendants TRUE ENERGY GEOTHERMAL CORP., TRUE GEOTHERMAL DRILLING CO. and MID-PACIFIC GEOTHERMAL INC., (hereinafter "Defendant True") filed their respective

Motions To Dismiss, Or Alternatively, For Partial Summary Judgment. These Motions came on for hearing before the Honorable ERNEST H. KUBOTA, Judge of the Third Circuit Court on February 14, 1991. PAUL F. NAHOA LUCAS,; YUKLIN ALULI, ALAN T. MURAKAMI, MELODY K. MACKENZIE, and STEVEN C. MOORE, appeared for Plaintiff PDF. WILLIAM M. TAM appeared for Defendant State Officials, JAMES K. MEE and PAUL S. AOKI appeared for Defendant Campbell. GARY B. K. T. LEE, STEPHANIE A. REZENTS and EDSEL M. YAMADA appeared for Defendant True.

The Court having reviewed the Memoranda, the files, pleadings and records herein, and having heard and considered the arguments of counsel, and being fully apprised of the premises, makes the following Findings of Fact and Conclusions of Law. These Findings of Fact and Conclusions of Law shall be construed as follows:

(i) If it is later determined that a Finding of Fact should properly be deemed to be a Conclusion of Law, the Court so concludes on those legal issues.

(ii) If it is later determined that a Conclusion of Law should properly be deemed to be a Finding of Fact, the Court so finds on those factual issues.

(iii) To the extent that any of the following Findings of Fact and Conclusions of Law include a mixed finding of fact and conclusion of law, each shall be given full effect.

APPLICABLE LEGAL STANDARDS:

1. A motion to dismiss under Rule 12(b)(6), Hawaii Rules of Civil Procedure (hereinafter, HRCP) is warranted if it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of a Plaintiff's allegations. *Hayes v. Nagata*, 68 Haw. 662, 666, 730 P.2d 914, 916 (1986) (affirming the dismissal of a negligence claim). *Bertelmann v. Toas Associates*, 69 Haw. 95, 99, 735 P.2d 930, 983 (1987) (sustaining the dismissal of a dram shop complaint for the failure to state a claim).

2. A motion for summary judgment shall be granted under HRCP, Rule 56:

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See also Coll v. McCarthy, 72 Haw. 20, 804 P.2d 881 (1991). (affirming a summary judgment in favor of the defendant).

> [T]he inferences to be drawn from the underlying facts alleged in the materials . . . considered by the court in making its determination must be viewed in the light most favorable to the party opposing the motion.

Sharples v. State, 71 Haw. 404, 405, 793, P.2d 175, 176 (1990) (affirming summary judgment against the plaintiff's claims).

Once the movant has satisfied the initial burden of proof by showing the absence of a genuine issue of material fact, the burden shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial. The non-moving party may not merely rely on the allegations of the pleadings. Failure to make a showing sufficient to establish the existence of an element essential to that non-moving party's case, and on which that party will bear the burden of proof at trial, summary judgment may be granted. *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989) (affirming summary judgment after the defendant failed to submit competant [sic] evidence to contest the motion).

FINDINGS OF FACT

1. Plaintiff PDF is a non-profit corporation incorporated in February 1987 by Ralph Palikapu Dedman ("Dedman"), Dr. Noa Emmett Aluli, M.D. ("Aluli"), and Lehua Lopez ("Lopez") for "religious, charitable, scientific, literary and education purposes."

2. Defendant State Officials are named in their official, not individual, capacities as members of the State Board of Land and Natural Resources. Defendants MOSES KEALOHA, DOUGLAS ING, HERBERT ARATA, and LEONARD ZALOPANY no longer serve as members of the BLNR. Defendant WILLIAM PATY was not a member of the BLNR when the events at issue herein occured. [sic]

3. Defendant Campbell is a private trust operated for the benefit of individual beneficiaries. Defendants FRED E. TROTTER, W. H. McVAY, P. R. CASSIDAY, and

HERBERT C. CORNUELLE, are sued in their fiduciary capacity as Trustees under the Will of James Campbell, Deceased. Defendant Campbell currently holds fee simple title to the surface estate of the former Wao Kele O' Puna Natural Area Reserve and the former Puna Forest Reserve pursuant to Land Patent Grant No. S-15666.

4. Defendant MID-PACIFIC GEOTHERMAL, INC. is a Nevada-based corporation, licensed to do business as a corporation in the State of Hawaii. Defendant TRUE GEOTHERMAL DRILLING COMPANY, is a Wyoming-based corporation licensed to do business as a corporation in the State of Hawaii. Defendant TRUE ENERGY GEOTHERMAL COMPANY is a Wyoming-based partnership licensed to do business in the State of Hawaii.

5. The BLNR held four administrative contested case hearings in the Puna district, Island of Hawaii, to consider designation of Kahauale'a and later the KMERZ as Geothermal Resource Subzones ("GRS") and Campbell's application for a Conservation District Use Permit ("CDUP") to allow geothermal exploration and development. Public notice was published prior to each hearing. In each of the following contested case hearings the BLNR acted in a quasi-judicial capacity pursuant to Hawaii Revised Statutes ("HRS") §91-1(5):

(a) Kahauale'a Conservation District Use Application (HA-3/2/82-1463);

(b) Kahauale'a Geothermal Resource Subzone Hearing (GS 3/2/82-1) (8/27/84).

(c) Kilauea Middle East Rift Geothermal Resource Subzone (GS 9/6/85-5).

(d) Kilauea Middle East Rift Zone Conservation District Use Application hearing (HA 12/20/85-1830).

6. Lopez participated in all four of the contested case hearings. Dedman and Aluli participated in the last three of those hearings.

7. During the third and fourth contested case hearings, Dedman, Aluli and Lopez raised state statutory, state constitutional and breach of trust claims. *See e.g.* Dedman and Aluli's Proposed Findings of Fact and Conclusions of Law, Memorandum of Law, (03/21/86, CDUA No. HA-12/20/85-1830), pages 10-18 attached as Exhibit "U" to Defendant State Official's Motion to Dismiss.

8. During the third and fourth contested case hearings Aluli, Dedman and Lopez were represented by legal counsel and actively participated in presenting evidence, cross examining witnesses and in submitting oral and written testimony to the BLNR.

9. On October 25, 1985, the BLNR approved a land exchange agreement between the State of Hawaii and the Campbell Estate. In the land exchange, the State of Hawaii transferred approximately 27,644 acres of Kilauea Middle East Rift Zone ("KMERZ") lands for 25,461 of acres of Kilauea Upper East Rift Zone lands located in Kahauale'a, Puna.

10. On October 25, 1985, the BLNR also approved the withdrawal and cancellation of Wao Kele O' Puna from the Natural Area Reserve System ("NARS") designation in the KMERZ and at the same time established a new NARS covering 16,727 acres on the newly-acquired Kahauale'a lands.

11. On November 8, 11, and 16, 1985, the BLNR published written notice of the proposed land exchange.

12. On November 13-15, 1985, the BLNR conducted a contested case hearing on the proposal to designate approximately 8,447 acres in the KMERZ area as a GRS.

13. On December 20, 1985, the BLNR approved the GRS designation in the KMERZ area.

14. On December 23, 1985, the State of Hawaii and Defendant Campbell executed the land exchange deed.

15. On April 23, 1986, Hawaii's Legislature adjourned without disapproving the land exchange as was its prerogative under HRS Section 171-50.

16. On June 18, 1986, the BLNR approved the CDUP allowing for geothermal exploration and development in the KMERZ area.

17. On October 27, 1986, President Reagan signed into law Pub. L. 99-564, 100 Stat. 3179, authorizing the federal government to acquire the approximately 5,800 acre "Tract 22" within the State's new Kahauale'a lands which lies adjacent to the Volcanoes National Park to preserve endangered birds and the sensitive "wilderness quality" of Tract 22.

18. On July 4, 1987 the Hawaii Supreme Court affirmed the BLNR's decisions designating the KMERZ as a GRS and authorizing a CDUP for geothermal exploration and development activities in the KMERZ area. *Dedman and Aluli v. BLNR*, 69 Haw. 255, 740 P.2d 28 (1987).

19. On April 25, 1988, the Supreme Court of the United States denied a petition for certiorari filed by

Dedman and Aluli from the Hawaii Supreme Court's decision in *Dedman v. BLNR*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 488 U.S. 1020 (1988).

20. On April 25, 1988, Plaintiff PDF filed an action in the United States District Court (Hawaii) challenging the land exchange and geothermal activities in the just concluded State court suit. Judge Alan Kay dismissed the case and the United States Court of Appeals for the Ninth Circuit affirmed the dismissal. *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. May 4, 1990). No further review was sought.

21. On March 10, 1989, Plaintiff PDF filed its companion Complaint for Declaratory and Injunctive Relief in this case.

22. On November 13, 1990, EMILY NAEOLE's Motion to Intervene in the present action was denied by this Court.

23. On December 13, 1990, Plaintiff PDF filed its First Amended Complaint for Declaratory and Injunctive Relief ("First Amended Complaint"). In the First Amended Complaint Defendant Campbell and Defendant True were for the first time in this action named as Defendants.

24. The First Amended Complaint states eleven Claims For Relief:

> (a) Claim One alleges that "Defendants breached fiduciary duties to Plaintiffs under §5(f) of the [Hawaii] Admission Act and violated 42 U.S.C. §1983" by failure to adhere to the terms of the [§5(f)] trust" in Hawaii's Admission

Act and "by this same action . . . violated" Article XII, §4 of Hawaii's State Constitution.

(b) Claim Two alleges the breach of the same provisions for "failure to act exclusively for the interest of the beneficiaries."

(c) Claim Three alleges breach of the same provisions for "failure to hold and protect trust property."

(d) Claim Four alleges breach of trust of the same provisions and HRS § 171-50(b) (1985) for "failure to act as an ordinary prudent person would in managing trust lands."

(e) Claim Five alleges that "in making this land exchange" and "for failing to manage ceded lands consistent with the laws of the State of Hawaii" the rights and provisions of Article XII, §7 of Hawaii's State Constitution (regarding the rights of ahupua'a tenants) and §5(f) of The Hawaii Admission Act were violated.

(f) Claim Six alleges that HRS §171-50 (1985) and §5(f) of The Hawaii Admission Act were violated because "no public purpose was served" by the land exchanges.

(g) Claim Seven alleges that HRS Chapter 195 was violated because "no power was granted to the BLNR . . . or to any other authority to withdraw land from the [Natural Area Reserve] system."

(h) Claim Eight alleges violations of due process under Article I §5 of Hawaii's State Constitution and the Fourteenth Amendment of the United States Constitution "contrary to 42 U.S.C. §1983" because Plaintiff PDF had "no pre- or post-deprivation notice or opportunity

to be heard" and that "Defendants made no record of the impact of the land exchange on these [above described] property rights."

(i) Claim Nine alleges that HRS §171-26 (1985) was violated because Defendant State Officials "never identified, marked, nor surveyed existing trails" to public hunting areas.

(j) Claim Ten alleges violations of the right to "free association" and "access" under the First Amendment of the U.S. Constitution and Article XII, § 7 of the Hawaii State Constitution.

(k) Claim Eleven alleges that Defendant Campbell took the exchanged lands subject to a constructive trust and that Defendants violated all constitutional and statutory duties previously alleged, including HRS Chapter 195.

25. Plaintiff PDF's First Amended Complaint does not allegate fraud or malice.

26. Plaintiff alleges in Paragraph 6 of its First Amended Complaint that its membership included persons who are of fifty percent (50%) or more Hawaiian blood who live in certain ahupua'a abutting but not in Wao Kele O' Puna. *See e.g.,* Affidavit of Emily Naeole.

27. Plaintiff PDF did not plead or present any evidence that its members actually resided in or were lawful occupants of ahupua'a within the GRS area of Wao Kele O' Puna.

28. Defendants' Answers raised the following defenses:

(a) this suit is barred by the State's sovereign immunity;

(b) under *Will v. Michigan Department of Police*, 491 U.S. 58 (1989), actions pursuant to 42 U.S.C. §1983 for retroactive relief against State Officials acting in their official capacity fail to state a claim since a "state" is not a "person" under §1983;

(c) the two year statute of limitations for actions pursuant to 42 U.S.C. § 1983 bars this suit as well as the late joinder of Defendants Campbell and True;

(d) Defendants Campbell and the State Officials are both indispensable [sic] parties yet neither can be maintained as a party thus barring remedial relief against either one;

(e) failure to state a claim;

(f) lack of standing;

(g) Plaintiff PDF has no express or implied private cause of action under HRS §§171-11, -26, -50, HRS Chapter 195, Hawaii Constitution, Article XII, §§4 and 7, as well as Article I, §5, the First and Fourteenth Amendments, or §5(f) of Hawwaii's [sic] Admission Act;

(h) Plaintiff PDF's statutory claims are defective in that such claims (i) are not enforceable under 42 U.S.C. §1983; and (ii) there is no proof from which a finder of fact could conclude that either the general "one or more provisions of §5(f), or that state laws identified in §5(f) have been violated;

(i) res judicata and bar and merger preclude this action by virtue of prior adjudication in the administrative and judicial determinations concluded by the decisions in *Dedman v. Board of Land and Natural Resources*, 69 Haw. 255,

740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988), by the reasoning of *Tennessee v. Elliott*, 478 U.S. 788 (1986);

(j) State officers' official immunity;

(k) estoppel;

(l) failure to exhaust administrative remedies;

(m) the discretionary function doctrine;

(n) the continuing force of and compliance with HRS §7-1 for gathering rights of ahupua'a tenants;

(o) Plaintiff PDF had no United States Constitutional Fourteenth Amendment or Hawaii Constitutional, Article I, §5 "property" in the lands in question. Even if Plaintiff PDF did, Defendant State Officials have complied with all federal and state constitutional due process requirements;

(p) Defendant State Officials have the authority to and did comply with all requirements of law to cancel and withdraw land from a Natural Area Reserve;

(q) Hawaii's Legislature reviewed and did not disapprove the land exchange as was its prerogative under HRS §171-50;

(r) Congress ratified the land exchange by its approval of legislation authorizing the federal government to acquire Kahauale'a's Tract 22 from the State for federal lands of equal value;

(s) Plaintiff PDF was not deprived of any First Amendment rights;

(t) Defendant State Officials' actions were authorized by law and were not ultra vires;

(u) the State's full compliance with all laws;

(v) laches;

(w) lack of jurisdiction; and

(x) HRS §171-26 does not apply to this land exchange.

29. Plaintiff PDF did not file this case as a class action.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties.

2. There are no material issues of relevant facts between Plaintiff PDF and Defendants.

3. A "State" Is Not A "Person" Under 42 U.S.C. §1983. Therefore Suits Against State Officers Acting In Their Official Capacity For Retroactive Relief Fail To State A Claim For Relief.

States are not "persons" under 42 U.S.C. §1983 and are not subject to suit under that section. *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989). An action against State officers named in their official, not individual, capacity is a suit against the State of Hawaii and not against particular individuals. *Kentucky v. Graham,* 473 U.S. 159, 165-166 (1985).

The only exception to this rule is the federal line of cases following *Ex Parte Young,* 209 U.S. 23 (1908) which allow suits against State officers in their official capacity

to proceed only if the relief sought is prospective and does not work against the State itself or the State's treasury. The reason for "stripping" State officials of their "State" character and authority prospectively is to require public officers to conform their future behavior to constitutional requirements or federal law if, for some reason, it is thought that they might deviate from such standards. The logic does not apply retrospectively to past conduct because the complexity of State officials acting as the State's agents can not be undone without implicating all the various aspects of the State as a sovereign, including its treasury, the conduct of other officials clothed with immunity, the behavior of coordinate branches of government, and the widespread reliance that attaches to the official events. *Pennhurst State Schools & Hospital v. Haldenman*, 465 U.S. 89, 100-118 (1984).

In the federal courts, this restriction is embodied in the Eleventh Amendment. It is not so much a bar on retroactive claims as it is a limited exception to the general prohibition of sovereign immunity for certain prospective claims.

In *Will v. Michigan Department of Police*, 491 U.S. 98 (1989), the United States Supreme Court examined the origins of 42 U.S.C. §1983 and concluded that it was not intended to reach conduct in state court that would be barred in federal court under the Eleventh Amendment. Accordingly, if the State's sovereign immunity can not be overridden in federal or state court, then the word "person" in 42 U.S.C. §1983 should not be read to include a state. For to do so would create a greater federal remedy in state courts than was available in federal courts. Historically, Congress adopted 42 U.S.C. § 1983 to provide

civil rights litigants a federal forum in the post-Civil War South where state courts remained unfriendly to such claims. In *Will, supra,* footnote 10, the court notes that prospective relief under the "authority stripping" theory of *Ex Parte Young,* 209 U.S. 23 (1908), still would apply as it does in federal courts.

Applied to this case, *Will* requires the Court to conclude that Plaintiff PDF has failed to state a claim where it relies upon 42 U.S.C. §1983 for alleged violations of federal laws for any counts seeking retroactive relief. Plaintiff PDF's First, Second, Third, Fourth, Eighth, and Eleventh Claims expressly rely upon §1983. Plaintiff PDF's Fifth, Sixth, Seventh, and Eleventh Claims of its First Amended Complaint assert violations of §5(f). But it is clear that no implied right of action is created by §5(f), *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission,* 588 F.2d 1216 (9th Cir. 1978), so that those claims also depend upon §1983.

It remains to determine whether the relief Plaintiff PDF seeks is prospective or retroactive relief.

Less than a year ago, the United States Court of Appeals affirmed the dismissal of Plaintiff PDF's companion federal case, *Ulaleo v. Paty,* 902 F.2d 1395 (9th Cir. 1990), reasoning that Plaintiff PDF's claims sought retrospective relief against the State of Hawaii, insofar as Plaintiff PDF sought to restore its position and that of its members to the situation in existence prior to the conveyance of the Wao Kele 'O Puna parcel to the Campbell Estate. *Id.* at 1400. This finding is collateral estoppel in this litigation.

The same result obtains here even if collateral estoppel does not apply. This action must be dismissed because it seeks relief that would expend itself on the treasury of the State of Hawaii in a manner with respect to which there has been no "clear relinquishment" of the State's immunity to suit for retrospective relief. *See generally, Dalehite v. United States*, 346 U.S. 15, 31 (1953) (on the United States' retained sovereign immunity under the Federal Tort Claims Act).

It is clear, from the Ninth Circuit's disposition, (State Defendants Officials' Exhibit "D") and from the amended complaint here, that the claims pleaded against Defendant State Officials seek retroactive relief. The alleged breaches of state law which Plaintiff seeks to redress occurred in the past. PDF's claims, if granted, would cloud Defendant Campbell's title to the Wao Kele 'O Puna parcel. As the Ninth Circuit reasoned, "[t]he immediate relief plaintiffs seek would require the state to purchase the lands from its present holder by way of cash or other land." *Ulaleo v. Paty*, 902 F.2d at 1400.

The doctrines relied upon by the Ninth Circuit in the companion federal case determining the prospective/retroactive distinction under the *Ex Parte Young* line of cases are also those which inform the law of sovereign immunity in the state courts. *W. H. Greenwell Ltd. v. DLNR*, 50 Haw. 207, 209, 436 P.2d 527, 528 (1968).

In the *Ulaleo* action, the Ninth Circuit traced the ban on retrospective relief to *Ex Parte Young*, 209 U.S. 123 (1908), which held, for purposes of the federal sovereign immunity codified in the Eleventh Amendment, that a suit against a state official is not against the State when it

seeks prospective relief designed to end a present, and ongoing violation of federal constitutional law.

In 1986, in *Papasan v. Allain*, 478 U.S. 265 (1986), the United States Supreme Court held that the "authority stripping" theory of *Ex Parte Young* did not allow a suit by Mississippi schoolchildren seeking to have the State of Mississippi replenish the Chickasaw In Lieu Sessions Trust on account of the complete destruction of the corpus of that trust during the Civil War. Without reaching the statute of limitations there, the Supreme Court held that such "breach of trust" claims were retrospective, and barred by sovereign immunity. In the *Ulaleo* case, the Ninth Circuit applied this rule to the facts which Plaintiff PDF seeks to litigate in this action:

> Although *Papasan* is at least superficially different from this case in that its trust corpus ceased to exist completely, what is important is the Supreme Court's characterization of the relief sought in the violation of a trust. The complaint is the sometime in that past, the BLNR undertook an action, the land exchange, which allegedly injured the plaintiffs by violating the trust of which the plaintiffs are beneficiaries. There is not allegation that the Board is continuing to violate its trust duties in other ways or that it is likely to do so in the future. The immediate relief plaintiffs seek would require the state to purchase the lands from its present holder by way of cash or other land. We hold that to grant the requested relief would be a retrospective remedy, as opposed to stopping an ongoing violation of federal law.

Ulaleo v. Paty, 902 F.2d at 1400. The same is true here. Relief that would operate in a retrospective nature is not

available. *W. H. Greenwell, Ltd. v. Land Department*, 50 Haw. 207, 209, 436, P.2d 527, 528 (1968).

Plaintiff PDF's First Amended Complaint speaks in terms of declaratory and injunctive relief suggesting that the relief they seek is prospective only. However, the predicate to each of their claims is that the 1985 land exchange was illegal. Without that determination, there is no premise for their claim that State Officials are violating any law. The court would need to go back into the past to determine the legality of the land exchange before any of Plaintiff PDF's other assertions could even be examined. *Papasan* makes clear that this is retroactive relief. Moreover, it does not matter that Plaintiff PDF describes its claims as declaratory and injunctive only. In *Green v. Mansour*, 474 U.S. 64, 69-73 (1983) the United States Supreme Court explained that where there is no claimed continuing violation of federal law or threat of future violation, a declaratory judgment is inappropriate because it would be used to accomplish and would have the same effect as an award of damages or restitution. Similarly, an injunction can not affect an act that is already done and of which there is nothing more to accomplish. Clearly, Plaintiff PDF may not realize through a choice of words what the United States Supreme Court has declared to be outside the bounds of §1983 and barred by the doctrine of sovereign immunity.

Papasan and *Will* are squarely on point here and require dismissal.

Therefore, all of Plaintiff PDF's First through Eighth and its Eleventh claim against Defendant State Officials in their official capacity under 42 U.S.C. §1983 alleging

violations of §5(f) of the Admission Act and federal constitutional provisions must be and are dismissed.

4. The State's Sovereign Immunity Bars This Suit.

It is an established principle of jurisprudence that a sovereign can not be sued in its own court without its express consent. *Big Island Small Ranchers Association v. State of Hawaii*, 60 Haw. 228, 236, 388 P.2d 430, 436 (1978). The State of Hawaii has not consented to nor waived its immunity to this action. As discussed above, an action against state officials in their official capacity is an action against the State itself when it would act retroactively. Sovereign immunity "covers state officials acting in their official capacities," *Helela v. State*, 49 Haw. 365, 369, 418 P.2d 482, 485 (1966); *accord, Makanui v. Department of Education*, 6 Haw.App. 397, 721 P.2d 165 (1986). Here plaintiff PDF seeks to invalidate a past deed transferring title of the KMERZ lands from the State, not just these officials, to Defendant Campbell. The deed was executed and the Hawaii Legislature reviewed it without disapproving the transaction. There is no "ongoing" character to the title in the State. It has been transferred to Defendant Campbell. The §5(f) trust characteristics passed form [sic] the KMERZ lands to the newly acquired Kahauale'a lands as §5(f) and §5(g) of the Admission Act expressly provide. The Kahauale'a lands are now imbued with the trust; the transferred KMERZ property is no longer.

While Plaintiff PDF's federal suit was dismissed pursuant to the Eleventh Amendment's absolute bar on retrospective relief against the State of Hawaii in federal court, this suit must be dismissed because none of the statutes that waive sovereign immunity in state court

permit a suit like this to be brought. And absent express waiver, "the doctrine of sovereign immunity precludes any suit against the State without the State's express consent." *Big Island Small Ranchers Association*, 60 Haw. at 236, 589 P.2d (178) at 436 (citations omitted).

The authority to exchange land under HRS §171-50 is a discretionary function vested by statute in the BLNR, the Governor and the legislature. The statutes regarding land exchanges do not waive the state's sovereign immunity. "[T]he only suits to which the state has consented are defined by" HRS Chapters 661 and 662. *Waugh v. University of Hawaii*, 63 Haw. 117, 125-26 621 P.2d 957, 965 (1980). Plaintiff PDF has not sought compensation, money damages, or claimed any statutory monetary entitlement that would bring it under HRS Chapter 661 which is Hawaii's counterpart to the Federal Tucker Act. *U.S. v. Mitchell*, 463 U.S. 206, 217 (1983) *see Meyer v. Territory*, 36 Haw. 70 (1941). It is not applicable because none of the statutes at issue in this case "mandate compensation" to Plaintiff PDF for their alleged violation. *See United States v. Mitchell*, 463 U.S. 206, 217 (1983).

The State has not waived its immunity to this kind of retroactive relief under HRS Chapter 662. Because there is no statute that authorizes this Court to grant relief against the State of Hawaii, sovereign immunity bars this suit. And claims under Chapter 662 for compensation for the policy decisions involved in the land exchange are without merit in light of the discretionary function exception, HRS § 662-15(1) (1985). *See Julius Rothschild & Co. v. State*, 66 Haw. 77, 80, 655 P.2d 880, 881 (1982) (per curiam).

In *Papasan, supra*, the bar existed even though the trust corpus had been destroyed. Here, the trust corpus remains intact in the newly acquired Kahauale'a lands which now take on the characteristics of the §5(f) trust. In addition the State retained undisputed title to the geothermal mineral rights in the KMERZ area. The trust res remains intact even though it is now in different lands. *Papasan* controls here.

Moreover, HRS Chapter 673, the "Native Hawaiian Trusts Judicial Relief Act", is inapplicable to the claims stated in this action. Chapter 673 by the terms of its enabling Act, Ch. 395, 1988 Session Laws of Hawaii ("SLH"), states that it "shall not apply to any cause of action which accrued, rights and duties that matured, penalties that were incurred, or proceedings that were begun, prior to July 1, 1988," in the absence of a failure, specifically defined, of joint gubernatorial-legislative action "relating to the Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii implementing sections 4 and 5(f) of the Admission Act[.]" *See* Ch. 395, §5, 1988 SLH.

Otherwise, "HRS Chapters 661 and 662 are the only instances where [the] State has consented to be sued for damages," *Washington v. Fireman's Fund Ins. Cos.*, 68 Haw. 192, 198, 708 P.2d 129, 133 (1985), *cert. denied*, 476 U.S. 1169 (1986), and Plaintiff has not shown how any provision of either of those chapters allows this suit. For this reason, all of Plaintiff PDF's claims against Defendant State Officials in their official capacities for retrospective relief or for declaratory or injunctive relief that would operate against the State itself must be dismissed in its entirety.

5. Since The State Is An Indispensable Party To This Action, Plaintiff PDF's Claims Against The Campbell and True Defendants Must Also Be Dismissed

As set forth above, this action against the State is barred by the doctrine of sovereign immunity. The other Defendants have raised the issue of whether the action may be maintained against them in the absence of the State. *See* Defendant True's Second Supplemental Memorandum Re: *Will v. Michigan Department of State Police,"* filed on February 22, 1991, at 2; Defendant Campbell's Second Supplemental Memorandum in Support of its Motion to Dismiss filed on February 25, 1991, at 4-6.

Indispensability of a party is an issue which is so vital that it can be raised at any time, as well as considered by the Court *sua sponte. Haiku Plantations Association v. Lono,* 56 Haw. 96, 529 P.2d 1 (1974); *Filipino Federation of America v. Cubico,* 46 Haw. 353, 380 P.2d 488 (1963); *Mossman v. Hawaiian Trust Co., Ltd.,* 45 Haw. 1, 361 P.2d 374 (1961).

Rule 19(a) of the Hawaii Rule of Civil Procedure ("HRCP"), provides in pertinent part that a person shall be joined as a party in an action if:

> he claims an interest relating subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest or . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. . . .

HRCP Rule 19(b) further provides that if such a person cannot be made a party,

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

In making this determination, this Court is required to consider: (1) to what extent a judgment rendered in the State's absence might be prejudicial to it or to those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the State's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. Upon consideration of these four factors, the Court determines that the action cannot in equity and good conscience proceed in the absence of the State.

Plaintiff PDF seeks, *inter alia*, to impose a constructive trust upon the Wao Kele 'O Puna lands in favor of Plaintiff's members and other beneficiaries of the ceded lands trust because of the State's alleged breach of its trust duties. See Plaintiff's First Amended Complaint, ¶¶ 108-112. If the Court were to grant this relief, however, such a judgment could expose the State to contractual claims by Campbell and True for damages, for rescission of the land exchange and recovery of the Kahauale'a lands, or both. HRS Chapter 661.

A subsequent court considering such an action would conclude either: (a) the State is liable on such claims; or

(b) the State is not liable on such claims. Such a subsequent decision would either as a practical matter impair or impede the State's ability to protect its interest, or would subject Defendants Campbell and True to inconsistent obligations.

There is no practical way that this Court can fashion a judgment which would lessen this prejudice. If the judgment were to effectively grant the relief sought by Plaintiff here in the absence of the State, it would necessarily create the potential situation outlined above.

Moreover, this action may not simply circumvent the State's sovereign immunity. It is incongruous that the State could ultimately be found liable to True and Campbell because of an alleged breach of trust duties while being immune to such a claim in this action.

This suit seeks to affect both the property and political rights of the State. An adverse judgment could affect the State's property rights in Kaho'olawe, as well as the State treasury. In addition, in deciding the claims asserted here the Court must necessarily be determining the political rights of the State under the ceded lands trust.

"It is the law in this jurisdiction that a proceeding against property in which the State of Hawaii has an interest is a suit against the State and cannot be maintained without the consent of the State." *A.C. Chock Ltd. v. Kaneshiro*, 52 Haw. 87, 88, 451 P.2d 809, 811 (1969) Because the validity of the land exchange cannot be decided without the participation of the State, the lawsuit against the remaining Defendants as to the land exchange is no longer viable. *Mossman v. Hawaiian Trust Co., Ltd.*, 45 Haw. 1, 361 P.2d 374 (1961). The State is an indispensable

party and the claims must be dismissed as to all defendants *See, Munoz v. Ashford*, 40 Haw. 675, 686-687 (1955).

Therefore, Plaintiff's PDF's Claims One through Four, Six through Nine, and Eleven in its First Amended Complaint must be dismissed as to Defendants Campbell and True.

6. The Statute of Limitations Bars This Action.

Federal law governs the characterization of claims brought under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261 (1985). However, the applicable statute of limitation period is a matter of state law. *Id.* at 269. In *Wilson*, the Supreme Court held that actions brought under 42 USC §1983 are "best characterized as *personal injury action*[s.]" *Id.* at 279. [emphasis added]

Subsequently, in *Owens v. Okure*, 488 U.S. 235, 241 (1989) the Court reaffirmed that "a State's *personal injury* statute of limitations should be applied to all §1983 claims," (emphasis added) but where there are "multiple statutes of limitations for personal injury actions," including a residual statute for all other personal injury actions, the residual or general personal injury statute of limitations applies. *Id.* at 249-250.

In Hawaii, as the federal district court noted in the companion action, the residual or general personal injury limitations period is two years. *Ulaleo v. Paty*, D. Haw. No. 88-320, Slip Op. at 11, *supra*. *See also Tamura v. FAA*, 675 F.Supp. 1221, 1224 (D. Haw. 1987).

HRS §657-7 (1985) provides in relevant part:

> *Damage to persons or property. Actions for* the recovery of compensation for *damages or injury*

> *to persons or property* shall be instituted within two years after the cause of action accrued, and not after [.] (emphasis added.)

Following *Owens*, the Ninth Circuit has rejected arguments that a State's *general* personal "catch-all" limitations period governs §1983 claims. *Del Percio v. Thornsley*, 877 F.2d 785 (9th Cir. 1989); *Perez v. Seevers*, 869 F.2d 425 (9th Cir. 1989), *cert. denied*, 110 S.Ct 172, (1989). HRS §657-7 contains its own "catch-all" provisions covering any action "for the recovery of compensation for damage or injury to persons." 877 F.2d at 786.

Plaintiff argues that the Supreme Court of Hawaii has applied the six-year period under of HRS §657-1(4) (1985) to claims for legal malpractice, *Higa v. Mirikitani*, 55 Haw. 167 (1973), and fraudulent inducement to purchase a house, *Au v. Au*, 63 Haw. 210, 626 P.2d 173, *recon. denied*, 63 Haw. 263 (1981). But neither *Higa* nor *Au* were "tort" cases in a strict sense. In *Higa* the court described legal malpractice as an "amalgam of both tort and contract" and shaped its ruling in light of this hybrid status. 55 Haw. at 172. In *Au*, the court likewise held that HRS §657-1(4) applied because it was "ambiguous" whether the claim was for fraudulent misrepresentation that induced the Appellant to contract for and purchase the house *or* for the specific property injury that arose from water leakage. *Au*, 63 Haw. at 215-217, 626 P.2d at 178-179. Nowhere did the *Au* court suggest that §657-7 HRS is not the Hawaii "residual or general personal injury statute of limitations." It is that issue, not the confusion whether a claim is for tort, contract or something else, on which *Owens* turns. *See Del Percio*, 877 F.2d at 786 and n. 3.

In the companion federal case, *Ulaleo v. Paty*, (D. Haw. 1988) No. 88-320 at 11, Judge Kay referring to the two year time period said with regard the federal case: "the statute of limitations has apparently run." (Exhibit "C", p. 11).

Had Plaintiff PDF filed this action under HRS Chapter 661 (Actions By and Against the State) or 662 (State Tort Liability Act), there would be no doubt. HRS §661-5 (1985) expressly provides that "[e]very claim against the State cognizable under this chapter shall be forever barred unless the action is commenced within the two years after the claim first accrues." Likewise, an action under the State Tort Liability Act, HRS §662-4 (1985) provides "[a] tort claim against the State shall be forever barred unless action is begun within two years after the claim accures[sic] . . . . "

In this case, the cause of action relates to a land exchange. The BLNR formally approved of the land exchange on October 25, 1985. The statute of limitations runs from the date the claimed invasion of Plaintiff PDF's interest or "wrongful act" begins. "A cause of action accrues under Hawaii law when the plaintiff *knows*, or through the exercise of reasonable diligence *should know* of his injury, the defendant's negligence (or violation of a duty), and the casual connection between the two." *Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 456 (9th Cir. 1986) (emphasis added.). Plaintiff's members could have appeared at the October 25, 1985 BLNR meeting and contested the proposed exchange. They would have had thirty days to appeal an adverse ruling under HRS §91-14. They might also have filed a complaint in State court within two years.

PDF has not responded by affidavit or otherwise to set forth specific facts showing that the following facts asserted by Defendants are in question. Therefore, under HRCP Rule 56(e), the court will treat them as true. *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 391, 772 P.2d 1187, 1180 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

PDF's members knew or shown[sic] have known of the land exchange. The matter was publicly noticed. (Exhibit "A" and "B"). The public and contested case hearings on the subzone were publicly noticed and held in the Puna district (Exhibit "B"). Dedman, Aluli and Lopez, Directors of PDF, were parties to the contested case hearing. Prehearing conferences for the contested case hearing on the proposed geothermal subzone designation on the newly exchanged land were held on November 1 and 7, 1985. The actual contested case hearings were held November 13-15, 1985.

The exchange deeds were formally executed by Defendant Campbell and the State of Hawaii on December 23, 1985.

PDF's officers and members knew of the land exchange by November, 1985, yet failed to pursue this claim in any State administrative or court proceeding or to timely initiate any complaint. On March 10, 1989, more than two years after the BLNR approved the exchange, after the deed was executed, and after failing to seek any State administrative or State court remedies, Plaintiff PDF filed this action. Plaintiff PDF waited almost five years to name Defendants Campbell and True.

Under HRS §171-50(c) (1985), Hawaii's Legislature retains the right to disapprove any exchange of public

lands at the legislative session next following the execution of the deed.

The Legislature at the next regular session following the December 23, 1985 execution of the deed exercised its statutory prerogative to review the exchange and adjourned on April 25, 1986 without disapproving it.

The accrual of the cause of action dates from the BLNR's "final approval" (October 25, 1985) or from the date the deeds were executed (December 23, 1985) or the latest when Hawaii's 1986 legislative session did not disapprove the land exchange upon adjournment April 25, 1986. The statute of limitations has run. This action is barred as to Plaintiff PDF's Claims One through Four, Six through Nine, and Eleven of its First Amended Complaint.

7. Even If Claims Had Been Timely Asserted Against State Officials, Such Claims Are Clearly Time-Barred As Against Defendants Campbell And True, And The Action Must Accordingly Be Dismissed.

Even assuming that Plaintiff PDF's claims had been timely asserted against State Officials, PDF's claims against Defendants Campbell and True are clearly barred by the two-year statute of limitations under HRS §657-7. Defendants Campbell and True were not named as parties to the action until December 13, 1990, almost five years after the exchange deed was executed. Since Plaintiff PDF's claims against Defendants Campbell and True are time-barred, this Court lacks jurisdiction over them, and they must be dismissed from the action.

As discussed above, this Court described the test for indispensability of parties. Application of the test here also mandates dismissal. It is clear that the Court cannot create an effective judgment absent the presence of Defendants Campbell and True. Any such judgment must necessarily affect the Defendants Campbell's and True's property rights in the Wao Kele 'O Puna lands.

It is a fundamental precept of due process that a person's property rights cannot be determined or affected by a court in that person's absence. *See Haiku Plantations Assoc. v. Lono*, 56 Haw. 96, 102-103, 529 P.2d 1, 5 (1974) *Rossiter v. Rossiter*, 4 Haw.App. 333, 337, 666 P.2d 617, 620 (1983).

"[W]hen the relief that is sought will require an affirmative act by a person over whom the court cannot acquire jurisdiction, or will have to be enforced against such a person, the court may view any judgment it might render as nugatory." 3A *Moore's Federal Practice*, §19.07-2[3] at 19-147 (2d ed. 1990). Since this Court cannot fashion an effective judgment in the absence of Defendants Campbell and True, PDF's Claims One through Four, Six through Nine and Eleven, of its First Amended Complaint are barred.

8. The Claims Are Barred For Want Of Remedial Standing.

Plaintiff PDF lacks standing to challenge the management of §5(f) land. Because HRS Chapter 673 on its face does not apply to the present dispute, there is no question of statutorily-conferred standing. Plaintiff PDF must meet the requirement of an injury-in-fact. *See Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 283, 768 P.2d

1293, 1297 (1989) (*quoting, Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982)).

Plaintiff PDF has no indefeasible entitlement to maintain a particular status of Wao Kele 'O Puna, yet in the end, this is a case seeking management of the State's trust assets. In *ASARCO V Kadish*, 490 U.S. 605, 10-9 S.Ct. 2039, (1989), a plurality of the Court observed:

> [E]ven if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as the taxpayer claims. These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.

490 U.S. 614-15, 109 S.Ct. at 2043.

Section 5(f) of the Admission Act does not require any particular configuration of benefits for Plaintiff PDF's members. *See Price v. State of Hawaii*, 764 F.2d 623, 630 (9th Cir. 1985). That discretion does not diminish by reason of state law, because state law does not forbid the exchange and development which PDF protests. As the Ninth Circuit Court of Appeals recently stated:

> [I]t is not for us to declare that certain methods of holding, managing, and accounting for the

> ceded lands and income must be followed by the State and its officials. Whether the trust administration paradigm or some other paradigm informs the management method selected is a matter for the State's determination. It follows that the appellants cannot succeed on their claims that §5(f) has been violated simply because the State has commingled the ceded lands and their income with other lands and income, or because it has not invested in what appellants deem to be a prudent manner, or because the lands are in the hands of various departments or agencies[.]

Price v. State, 921 F.2d 950, 955 (9th Cir. Dec. 26, 1990).

Because BLNR has chosen to exchange lands in the §5(f) corpus for new lands that now go into the corpus as "proceeds" of a §5(f) disposition does not create a claim for action. Put another way, Plaintiff, PDF has no standing to challenge BLNR policy choices in managing public lands.

There is plainly no constitutional claim that is enforceable under §1983, as neither §5(f), nor its "included" state laws provide Plaintiff PDF with any "legitimate claim of entitlement" to a particular BLNR action, *see Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989). Noticed public hearings provided the process due. *Medeiros v. Hawaii County Planning Comm'n*, 8 Haw.App. 183, 196, 797 P.2d 59, 66 (Haw. App. 1990) (*citing, Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). This leaves only Plaintiff PDF's claim that the Admission Act, and the "state laws" referred to therein, are independently enforceable under 42 U.S.C. §1983. As discussed above, *Will v. Michigan Department of Police*, 491 U.S. 58

(1989), forecloses such a claim. As the Supreme Court held in 1987, there is a "strong presumption against the defeat of state title," and, therefore, vehicles for federal control over lands returned by an admission act must be "affirmatively intended." *Utah Division of State Lands v. United States,* 482 U.S. 193, 202 (1987). "There is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virture[sic] of its inclusion in a state plan required by federal law." *Oberlander v. Perales,* 740 F.2d 116, 119 (2d Cir. 1984). State laws referred to in §5(f) are not independently enforceable under 42. U.S.C. §1983, for if they were " 'every suit to establish title to land in the central and western United States would so arise, as all titles in those States are traceable back to [federal] laws.' " *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 815 n.12 (1986).

9. There Are No Enforceable Rights or Private Rights of Action Under HRS Chapter 195 or HRS Section 171-50.

The management of NARS lands is vested in the Department of Land and Natural Resources. HRS §195-3. The department is authorized to adopt rules and regulations for the use, control, and protection of the lands. HRS §195-5. Those functions are internal property management decisions within the department just like the day to day management of other forest lands. These functions are carried out under the supervision of the BLNR in accordance with the directives established by statute and regulation. Statutes establishing and outlining the structure and actions of government, like HRS Chapter 195 do not of themselves provide for or contemplate a private

enforcement right. The creation of a division or department within the government and an outline of its role and authority does not automatically carry with it a right for private citizen to bring suit.

The legislature may choose to create a private right of action, either expressly or by implication, but it has not done so here. Clearly, there are no express private rights of action in HRS §§171-11, 171-26, 171-50, or Chapter 195.

To determine whether there is an implied private right of action, Hawaii has adopted a three part test.

> (1) Is the Plaintiff "one of the class for whose especial benefit the statute was enacted?
>
> (2) Is there any indication of express or implied legislative intent either to create such a remedy or to deny one? and
>
> (3) Would a remedy be "consistent with the underlying purposes of the legislative scheme?"

Reliable Collection Agency, Ltd. v. Cole, 59 Haw. 503, 507, 584 P.2d 107, 110 (1978); *see also* Cort v. Ash, 422 U.S. 66 (1978).

Hawaii courts have focused on legislative intent. *Hulsman v. Hemmeter Development Corp.*, 65 Haw. 58, 66-68 647 P.2d 713, 719 (1982) (no intent found for private remedy in state and federal statutes regulating possession and sale of firearms); *Wick Realty, Inc. v. Napali Sands Maui Corp.*, 1 Haw.App. 448, 453-454, 620 P.2d 750, 754 (1980) (no private cause of action for a broker's improper fee-splitting agreement). The inclusion in the statute of a mechanism for enforcement by public officials, which does not expressly allow suits by private individuals,

appears to be strong evidence that private remedies were not intended. *Reliable Collection Agency, Ltd.*, 59 Haw. at 510, 584 P.2d at 111; *Waikiki Discount Bazaar, Inc. v. City and County of Honolulu*, 5 Haw. App. 635, 641-642, 706 P.2d 1315, 1320 (1985) (authority to enforce city's zoning code and fire regulations "explicity conferred on specific public officials").

First, Plaintiff PDF has not shown that it is a member of a special class, different from the public generally, for whom any of the aforementioned statutes were passed.

Second, there is no indication anywhere in the history of these laws that the legislature intended to create a private right of action. In the case of the NARS chapter, the statute refers only to the State's authority to sue and enforce the rules within the NARS. HRS §195-5(b). Nothing in the legislative history indicates the legislature intended the public, any subgroups of the public, or a private association to derive and enforce any special benefits under these provisions.

Ownership and management are vested in the State. HRS §195-1 provides that the purpose of the chapter is to preserve and protect these areas for future generations and to establish baseline environmental data. Plaintiff PDF has no unique claim of benefit or enforcement under either.

The same analysis applies to HRS §171-50. The legislature reserved to itself the right to review land exchanges and executive orders by which lands are transferred. It exercised its oversight authority in this case. There is simply no indication that the legislative scheme intended private suits on these matters which were

vested in the executive branch of government, subject to legislative review.

Third, the creation of implied private rights to sue would be inconsistent with general enabling legislation, by granting special enforcement powers to self selected members of the public.

Therefore, because none of these statues create private rights or are intended to provide individual benefits upon which particular citizens can sue, Plaintiff PDF has no express or implied private right to bring suit under HRS Chapter 195, HRS §§171-11, 171-26, and 171-50 that are any different from the public at large. Accordingly, Plaintiff PDF's Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Claims in its First Amended Complaint are dismissed with respect to claims under HRS §§171-11, 171-26, 171-50, and Chapter 195.

10. Plaintiff PDF Failed To State A Claim Under Article XII, §7 Of The Hawaii State Constitution Against Defendant True.

Article XII, §7 of the Hawaii State Constitution provides individual rights to persons who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 and who are tenants actually residing in the ahupua'a in which said access rights are being asserted. *See also, Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982).

Plaintiff's First Amended Complaint fails to allege that members who are fifty percent (50%) or more Hawaiian, are also lawful occupants of an ahupua'a which

extends into Wao Kele 'O Puna. Plaintiff PDF, therefore, has failed to state a claim against Defendant True under Article XII, §7 of the Hawaii State Constitution.

Furthermore, the exercise of rights provided by Article XII, §7 of the Hawaii State Constitution is limited to the undeveloped areas of an ahupua'a and does not preclude the further development of the ahupua'a by the land owner. *Kalipi, supra.*

As Plaintiff PDF failed to show any right of access to the Wao Kele 'O Puna geothermal resource area under Article XII, §7 Plaintiff PDF cannot show a violation of its constitutional right to free association under the First Amendment to the United States and Hawaii State Constitutions.

As discussed above, the former Wao Kele 'O Puna land is now private property owned by Defendant Campbell. Plaintiff PDF has no First Amendment rights on this property. Therefore, there can be no violation of Plaintiff PDF's claimed rights. *See e.g., Estes v. Kapiolani Women's & Children's Medical Center,* 71 Haw. 190, 787 P.2d 216 (1990).

Plaintiff PDF has failed to rebut True's assertions that the property was used for private purposes and not open to the public. Therefore, Trues assertions must be viewed as controlling, under HRCP Rule 56(e), which provides in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwide[sic] provided in this rule, must set forth specific facts showing that

> there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See First Hawaiin Bank v. Weeks, 78 Haw. 392, 391, 772 P.2d.; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Therefore, Plaintiff PDF's Tenth Claim of its First Amended Complaint is dismissed.

11. Plaintiff PDF Lacked Standing To Bring An Action Pursuant To Article XII, §7 of The Constitution Of The State Of Hawaii, The First Amendment to The Constitution Of The United States Of America And The First Amendment To The Constitution Of The State Of Hawaii.

PDF further failed to satisfy all or even a part of the three-part test for determining whether it had standing to bring the pending suit on behalf of its members. The test is:

> (1) Whether its members would otherwise have standing to sue in their own right.
>
> (2) Whether the interests its seeks to protect are germane to the organization's purpose.
>
> (3) That neither the claim asserted, nor the relief requested requires the participation of the individual members in the lawsuit.

See Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 33, 343 (1977).

Plaintiff PDF's Tenth Claim alleging violations of the First Amendment of Article I, §5 of the Constitution of the State of Hawaii are premised on the illegality of the

land exchange. Plaintiff PDF's Tenth Claim must be dismissed as the land exchange is not invalid.

12 Plaintiff PDF's Claims Are Barred By Res Judicata And/Or Collateral Estoppel.

Dedman, Aluli and Lopez, and others raised access, religious, traditional and cultural practices claims in the prior State administrative and judicial proceedings over geothermal activities in the KMERZ area. Similar claims were also raised in *Ulaleo and Pele Defense Fund vs. Paty, et al.*, 902 F.2d 1395 (9th Cir. 1990). Identical claims are raised in the present action.

Throughout the prior administrative proceedings, the BLNR acted in its quasi-judicial capacity as it considered the claims of the respective parties, the testimony of witnesses and the weight of exhibits submitted into evidence. *See* HRS § 91-1(5).

Acting in its quasi-judicial capacity, the BLNR afforded all the parties to the administrative proceedings a full and fair opportunity to present their claims. *See Allen v. McCurry*, 449 U.S. 90 (1980), *citing Montana v. U.S.*, 440 U.S. 147 (1979).

Claims and/or issues presented, but not appealed from the BLNR's Decision and Order, Findings of Fact and Conclusions of Law constitute a final judgment on the merits after the time period for appeal had elapsed. *See Santos v. State*, 64 Haw. 648, 646 P.2d 962 (1982).

Plaintiff PDF and its founding members, Aluli, Dedman and Lopez are in privity with respect to the claims raised in the present action and those previously raised during the administrative proceedings and on appeal in

Dedman v. BLNR, supra. See generally, Blonder-Tongue Laboratories v. Univ. of Ill. Foundation., 402 U.S. 313 (1971).

The Hawaii Supreme Court's decision in *Dedman v. BLNR*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 488 U.S. 1020 (1988), is final and a bar to all claims that were or could have been raised during the administrative proceedings and made the subject to appellate review. Clearly, all questions involving geothermal activities on these lands were fully reviewed and decided.

The doctrines of res judicata and collateral estoppel bar any claims against the use of the KMERZ area for purposes of geothermal exploration and development.

Plaintiff PDF's claims under its Fifth, Seventh, Ninth and Tenth Claims of its First Amended Complaint are barred by the doctrines of res judicata and collateral estoppel.

13. Prior to 1987, HRS Chapter 195 Did Not Prohibit The Exchange Of Public Natural Area Reserve Lands For Private Lands.

At the core of Plaintiff PDF's First Amended Complaint is the idea that lands in a Natural Area Reserve can never under any circumstances be removed, exchanged, or transfered[sic] outside the NARS. However, HRS §171-50 expressly authorizes the State to exchange its public lands for private lands to accomplish public purposes. There are no prohibitions or restrictions limiting the scope of this authority to only certain classes of public lands. All public lands are within the scope of this delegated power. The power is circumscribed only by the reservation which the legislature reserved to itself to

review and disapprove such exchanges. The BLNR upon public notice and with the approval of the Governor may exchange any public lands subject only to the legislative disapproval process in HRS §171-50(c).

Lands may be exchanged whether they are encumbered or not. The exchange process terminates the prior use when title is transferred to a private party. The Governor's Executive Orders which are used within the government to set aside or withdraw lands from particular departments or functions, are also subject to the legislative disapproval process. However, the fact of being set aside does not prohibit their sale or exchange.

The final paragraph in HRS §171-11 expressly contemplates the disposition of set-aside lands without the requirement of withdrawing the original set-aside order. Clearly, where the lands are exchanged with the express approval of the BLNR and the Governor, are subject to statutory legislative review, and where the newly public (previously private) land acquires the characteristics of the old public (now private) lands, as in the present case, the Executive Order is terminated by virtue of the BLNR action and the signing of the deed. No additional formal action is required.

In *Natatorium Preservation Committee v. Edelstein*, 55 Haw. 55, 515 P.2d 621 (1973), the Hawaii Supreme Court held that, under HRS §171-11, lands withdrawn from the general pool of public lands and set aside by Executive Order could not be later withdrawn from the designated purpose without a subsequent Executive Order. But the following year, the Legislature *overruled Natatorium* in the

Act of May 15, 1974, ch. 16 §1, 1974 Haw. Sess. L. 20. The Legislature explained its action as follows:

> These amendments were necessitated by the State Supreme Court's recent interpretation of section 171-11, which mandates that land set aside for a public purpose must be withdrawn by the governor, then submitted to the legislature for its disapproval before such land may be disposed of by the board of land and natural resources for any use inconsistent with the public purpose for which it was set aside.
>
> This Committee feels that the foregoing amendments will give the governor and the board of land and natural resources greater flexibility in the management and control of public lands.

Haw. Sen. Stand Comm. Rep. No. 585-74, 1974 Haw. Sen. J. 978.

Thus, *Natatorium* is no longer controlling. In *Natatorium* the legislature had no opportunity to review or express its disapproval of the proposed destruction of structures previously set aside as the Waikiki War Memorial Natatorium. In the instant case, the legislature passed a resolution supporting the exchange and by virtue of the more comprehensive exchange process did in fact review the exchange deed in 1986.

Even if that were not true, the land exchange was not invalid, because lands within the NARS were included within the exchange. Here, prior to the passage of HRS Chapter 195, the BLNR had longstanding authority to dispose of §5(f) of the Admission Act land by sale or exchange. Such sales or exchanges are expressly contemplated by §5(f) itself. HRS, Chapter 195 did not implicitly

repeal HRS, Chapter 171 as "repeals by implication are not favored and that if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is to remain in force and that the later statute did not repeal it." *Reefshare, Ltd. v. Nagata*, 70 Haw. 93, 762, P.2d 169, 172 (1988) (*citing State v. Pacariem*, 67 Haw. 46, 48, 677 P.2d 463, 465 (1984)).

HRS Chapter 195, as first enacted, reaffirmed that any land transferred into the system would "be managed by the department of land and natural resources." HRS §195-3. Nothing in this language expressly bars a disposition or an exchange. While land may be placed in a NARS by Executive Order, that does not preclude transferring it by a land exchange executed by the BLNR and subject to legislative veto. *See* HRS §171-50(c). Thus, HRS Chapter 195, as originally enacted, did not impliedly repeal the State's discretion under HRS, Chapter 171 to sell or exchange public land. Once the land exchange was effected, the Puna land ceased by definition to be covered by NARS.

Finally, if one was needed, an Executive Order was executed to withdraw the Puna lands from NARS in 1987. The 1987 amendments to HRS Chapter 195 were designed to limit for the first time the kinds of dispositions of NARS lands that could be made. It "requires BLNR not to alienate any natural area reserve except to another public use which it finds is an imperative and unavoidable public necessity." Haw. Sen. Stand. Comm. Rep. No. 876-87, 1987 Haw. Sen. J. 1266. The claim that the BLNR did not have the authority to dispose of NARS lands until those amendments were adopted in 1987 misreads the legislative history.

In this case, the new 16,727 acre Kahauale'a NARS replaced the old 16,844 acre Middle East rift NARS. In addition, 5,800 acres of the Tract 22 adjacent to the Volcanoes National Park is preserved in the Protective subzone of the conservation district for possible inclusion in the Park. BLNR judged this exchange was beneficial to the overall management and protection of the State's natural resources.

Plaintiff PDF's claim that Defendant State Officials acted ultra vires of state law, which is essential to the claim PDF's federal civil rights were violated under color of state law, requires not only that there was no colorable authority under state law, but that Defendant State Officials acted without any authority whatsoever. As HRS §171-50 and its legislative history after *Natatorium* indicate, such authority is not only colorably present but expressly contemplated and authorized.

Plaintiff PDF made no allegations of fraud, malice or bad faith. If the exchange was authorized by a good faith reading and adherence to existing law, then Defendant State Officials' actions could not be ultra vires. PDF has failed to show facial violations of state statutes that could sustain a claim for ultra vires conduct.

Therefore, all of Plaintiff's claims based upon alleged violations of HRS Chapter 195 are dismissed.

V. DECISIONS AND ORDER

Based upon the foregoing and other reasons presented by the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Defendants State Officials', Campbell's and True's Motions to Dismiss Or, Alternatively, For Partial Summary Judgment Are Granted; and

2. That this action is dismissed in its entirety; and;

3 That the Court reserves jurisdiction to consider an award of attorneys' fees and costs to Defendants.

DATED: Hilo, Hawaii, May 20 1991

/s/ Ernest Kubota [SEAL]
ERNEST H. KUBOTA

Third Circuit Court,
State of Hawaii

APPENDIX C

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, United States Constitution (Supremacy Clause):

This Constitution, and the Laws of the United States which shall be made in the Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Eleventh Amendment, United States Constitution (1798):

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 United States Code Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Hawaii Admission Act, Section 5(f), Pub.L. 86-3, 73 Stat. 4 (March 18, 1959):

The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Hawaii Revised Statutes, Section 657-1(4) (1985):

The following actions shall be commenced within six years next after the cause of action accrued, and not after:

. . . .

(4) Personal actions of any nature whatsoever not specifically covered by the laws of the State.

Hawaii Revised Statutes, Section 657-7 (1985):

Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after. . . .

(2)

Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

No. 92-1112

In The

Supreme Court of the United States

October Term, 1992

PELE DEFENSE FUND,

Petitioner,

vs.

WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Hawaii

STATE OF HAWAII RESPONDENTS' BRIEF IN OPPOSITION

ROBERT A. MARKS
Attorney General
State of Hawaii
WILLIAM A. TAM*
Deputy Attorney General
Land/Transportation Division
Department of the Attorney General
State of Hawaii
465 South King Street
Honolulu, Hawaii 96813
(808) 587-2982
*Counsel of Record

STEVEN S. MICHAELS
Deputy Attorney General
Appellate Division
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Respondents Chairman and Members, Board of Land and Natural Resources, State of Hawaii ("State of Hawaii Respondents")

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

QUESTIONS PRESENTED

1. Whether Petitioner, a party to a federal judgment dismissing identical claims against the State officials here because the federal suit sought retrospective relief, was properly precluded in this state court action from repleading (a) the federal equity claims dismissed in federal suit; and (b) state law claims, which in the judgment of the state court, must fail because they also sought similar retrospective relief?

2. Whether affirmance is independently mandated by 28 U.S.C. § 1738 and the final judgment in *Dedman v. Board of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987)?

3. Whether, independent of preclusion law, the definition of "person" as that term is used in 42 U.S.C. § 1983, and other legal principles related to Hawaii's sovereign immunity require affirmance of the judgment of the Hawaii state courts below?

4. Whether Petitioner's federal claims, which were all filed more than two years after they accrued, were in any event properly terminated on statute of limitations grounds?

5. Whether, in light of *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), this Court would, if review were granted, affirm the judgment in that 42 U.S.C. § 1983 does not provide an enforcement vehicle for the federal statutory claims in this case, or, in that the record plainly refutes the contention that § 5(f) of the Hawaii Admission Act has in any way been breached?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
OPINIONS RELATED TO THE PETITION 1
JURISDICTION 2
STATEMENT OF THE CASE 2
REASONS FOR DENYING THE WRIT 10
CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

Allen v. McCurry, 449 U.S. 90 (1980) 11

American Surety Co. v. Baldwin, 287 U.S. 691 (1932) 12

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 2, 18

Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981) 14

Bernhard v. Bank of America Nationwide Trust and Savings Ass'n., 19 Cal.2d 807, 122 P.2d 892 (1942) 11

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 12

Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988) 1, 2, 3, 9, 13

Del Percio v. Thornsley, 877 F.2d 785 (9th Cir. 1989) 14

Eichman v. Fotomat Corp., 871 F.2d 784 (9th Cir. 1989) 15

Ex parte Young, 209 U.S. 123 (1908) 12

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 13

Felder v. Casey, 437 U.S. 131 (1988) 15

Higa v. Mirikitani, 55 Haw. 167, 517 P.2d 1 (1973) 14

I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 15

In re Bishop Estate, 36 Haw. 403 (1943) 11

TABLE OF AUTHORITIES – Continued

Page(s)

In re CDUA, HA 85-1830 (Haw. BLNR Apr. 11, 1986) 8

Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, 588 F.2d 1216 (9th Cir. 1978) ("*Keaukaha I*") 5, 15

Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992) 2

Montana v. United States, 440 U.S. 147 (1978) 11

Morneau v. Stark Enterprises, Ltd., 56 Haw. 420, 539 P.2d 472 (1975) 11

Oberlander v. Perales, 740 F.2d 116 (2d Cir. 1984) 17

Owens v. Okure, 488 U.S. 235 (1989) 4, 10, 13, 14

Papasan v. Allain, 478 U.S. 265 (1986) 3, 4, 9, 13

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) .11, 12

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 11

Perez v. Seevers, 869 F.2d 425 (9th Cir. 1989) 14

Price v. Hawaii, 764 F.2d 625 (9th Cir. 1985) 5, 14

Price v. Hawaii, 939 F.2d 702 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1479 (1992) 14

Reefshare, Ltd. v. Nagata, 70 Haw. 93, 762 P.2d 169 (1988) 17

Southern Pacific Railroad v. United States, 168 U.S. 1 (1897) 11

Suter v. Artist M., 112 S.Ct. 1360 (1992) ... 9, 15, 16, 17

TABLE OF AUTHORITIES – Continued

Page(s)

Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446, *cert. denied*, 484 U.S. 898 (1987) 5

Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990) ..... *passim*

Underwriters Assur. Co. v. North Carolina Life & Accident Insurance Guaranty Ass'n, 455 U.S. 691 (1982) 12

Utah Division of State Lands v. United States, 482 U.S. 193 (1987) 16

Will v. Michigan, 491 U.S. 58 (1989) 3, 9, 12

CONSTITUTIONS, STATUTES AND LEGISLATION:

Eleventh Amendment 3

28 U.S.C. § 1254 2

28 U.S.C. § 1257 2

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 10

Geothermal Development Act 6

Hawaii Admission Act § 5(f), Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959) ..... *passim*

Pub. L. No. 99-564, 100 Stat. 3179 (1986) 8, 17

H.R. Rep. No. 99-971, 99th Cong., 2d Sess. (Oct. 7, 1986) 17

Hawaiian Homes Commission Act, 1920 4

TABLE OF AUTHORITIES – Continued

Page(s)

Natural Area Reserves System Act ("NARS") 6

New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910) 16

The Organic Act of April 30, 1900, 31 Stat. 141 (1900) 4

Haw. Rev. Stat. § 171-11 (1985) 5

Haw. Rev. Stat. § 171-50(b) (1985) 5, 6

Haw. Rev. Stat. § 171-50(c) (1985) 6

Haw. Rev. Stat. § 195-3 (1985) 6

Haw. Rev. Stat. § 195-4(1) (1985) 6

Haw. Rev. Stat. § 195-4(2) (1985) 6

Haw. Rev. Stat. § 195-10 (Supp. 1992) 6

Haw. Rev. Stat. § 205-5.1 (1985) 6

Haw. Rev. Stat. § 205-5.2 (1985) 6

Haw. Rev. Stat. § 205-5.2(b)(4) (1985) 6

Haw. Rev. Stat. § 657-1(4) 1, 14

Haw. Rev. Stat. § 657-7 (1985) 4, 10, 14

Haw. Sen. Con. Res. No. 85-30 (Apr. 9, 1985) 7

Joint Resolution to Provide for Annexing the Hawaiian Islands, 30 Stat. 750 (1898) 4

COURT RULE:

Rule 15.1 18

No. 92-1112

In The

Supreme Court of the United States

October Term, 1992

PELE DEFENSE FUND,

Petitioner,

vs.

WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Hawaii

STATE OF HAWAII RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS RELATED TO THE PETITION

In addition to those cited in the Petition, the opinions in *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), and *Dedman v. Board of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988), as well as the unpublished orders below therein, are related to this Petition.

JURISDICTION

The Petition seeks to nullify the December 23, 1985 exchange deed between the State of Hawaii and the Estate of James Campbell, in which the State conveyed the surface rights to 27,786 acres of land which had been returned to Hawaii by its Admission Act, Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959).

The Hawaii Supreme Court denied Petitioner this relief. Because the alternative relief held open by the Supreme Court of Hawaii on remand, which would run solely against the private respondents, would not appear to moot entirely the Petitioner's prayer, the judgment below appears to be final. In addition, it would appear that Petitioner has Article III standing on the same basis as existed in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617-24 (1989), though Petitioner, we submit, would not have standing in federal district court in an original suit. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992).

The substantial jurisdictional defects in the Petition lay mainly under the scope of 42 U.S.C. § 1983 and the mandates Petitioner or its privies ignored in failing to seek review earlier in *Ulaleo*, and *Dedman*. *See* 28 U.S.C. §§ 1254, 1257.

STATEMENT OF THE CASE

This is essentially the third federal appeal in which the Pele Defense Fund or its privies have sought to undermine the foundational transaction for efforts to

develop geothermal energy in our State. In this transaction, the State of Hawaii exchanged roughly 27,800 acres of public "ceded" lands conveyed to the State of Hawaii under § 5 of its Admission Act for 25,800 acres of private fee simple land located adjacent to the environmentally and culturally sensitive Hawaii Volcanoes National Park on the Big Island of Hawaii. Nearly five years ago, this Court denied review in the first appeal, *Dedman v. Board of Land and Natural Resources*, 485 U.S. 1020 (U.S. cert. denied Apr. 25, 1988), which had presented to this Court as the sole question for review whether the development of the lands granted to Campbell Estate violated Petitioner's privies' rights under the First Amendment. In the second suit, *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), in which Petitioner was a party, Pele Defense Fund did not seek review here of the Ninth Circuit decision dismissing all its claims against the state parties on the basis of the Eleventh Amendment and the principles set forth by this Court in *Papasan v. Allain*, 478 U.S. 265 (1986). *Ulaleo*, like the instant suit, sought redress for alleged "breach of trust" cognizable under § 5(f) and 42 U.S.C. § 1983.

In the judgment below in this action, the Supreme Court of Hawaii concluded that, taken together with this Court's decision in *Will v. Michigan*, 491 U.S. 58 (1989), the judgment in *Ulaleo* precluded Petitioner's companion state court claims for "breach of trust" under 42 U.S.C. § 1983. Construing Hawaii's own law of sovereign immunity as imposing the same "prospective/retrospective" distinction that exists under Eleventh Amendment doctrine, the Hawaii Supreme Court also barred Petitioner's related state law claims. The court below concluded independently that the suit here sought retrospective relief of

the kind barred in *Papasan v. Allain*, 478 U.S. 265 (1986), and, thus, the claims raised here could not proceed.

In addition, the Hawaii Supreme Court, following the mandate of *Owens v. Okure*, 488 U.S. 235 (1989), determined that the Petitioner's federal claims were barred by the two-year residual limitations period for personal injury actions set forth at Haw. Rev. Stat. § 657-7 (1985). The court did not pass on a host of additional grounds for affirming the judgment of the state trial court, which had dismissed all claims for relief.

Whether the fact-bound judgment of the court below should be subject to further review here is the issue on this Petition.

1. The lands at issue in this suit were originally ceded by the Republic of Hawaii to the United States upon annexation of Hawaii in 1898, and were returned to the new State of Hawaii upon its admission to the Union in 1959, pursuant to § 5 of the Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959). *See also* the Joint Resolution to Provide for Annexing the Hawaiian Islands, 30 Stat. 750 (1898), and the Organic Act, Act of April 30, 1900, 31 Stat. 141 (1900). Under § 5(f), these "ceded" lands were granted to Hawaii in fee for disposition for "one or more" of five purposes: (1) "support of the public schools and other public educational institutions"; (2) "betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; (3) "development of farm and home ownership on as widespread a basis as possible"; (4) "making of public improvements"; and (5) "provision of lands for public use." Congress stated that failure to manage or dispose of

the lands subject to § 5(f) "for one or more of the foregoing purposes in such manner as the constitution and laws of [Hawaii] may provide" would be "a breach of trust for which suit may be brought by the United States." 73 Stat. at 6. The history of § 5(f) is barren of "any indication that Congress intended to create a private cause of action via the Admission Act," and, "by providing a specific remedy, Congress intended to exclude others." *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216, 1223 (9th Cir. 1978) ("*Keaukaha I*"); *but see Price v. Hawaii*, 939 F.2d 702 (9th Cir. 1991)), *cert. denied*, 112 S. Ct. 1479 (1992). As a general matter, § 5(f) "broadly allows the State to expend trust funds on 'one or more' of [the] five statutory purposes." *Price v. Hawaii*, 764 F.2d 625, 630 (9th Cir. 1985). Moreover, state constitutional provisions Hawaii has enacted to implement § 5(f), provide, in and of themselves, "no 'judicially discoverable and manageable standards,' " for allocating trust assets to native Hawaiian beneficiaries of the 5(f) trust. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 175, 737 P.2d 446, 457, *cert. denied*, 484 U.S. 898 (1987).

2. At all times relevant to this suit, Hawaii's general statutes governing public lands reaffirmed the discretion to sell or exchange public trust land. The State Board of Land and Natural Resources, assigned principal jurisdiction over the ceded lands, may dispose of "real property . . . less than the fee" without executive order, and may exchange public for private land for any "public purpose" without public auction. *See* Haw. Rev. Stat. §§ 171-11, 171-50(b) (1985). Public law mandates public notice for such land exchanges and grants the Legislature a one-session opportunity to disapprove of the exchange

by two-thirds vote for any reasons the Legislature might find appropriate. *Id.* § 171-50(c). The law states that "no exchange shall be made should public land exceed 120 per cent of the value of the private land," but grants the Board broad discretion to decide how value is to be computed so long as "a disinterested qualified appraiser" concurs. *Id.* § 171-50(b). Parts of the public lands at issue here were subject to the Natural Area Reserves System Act ("NARS"), a state law that, in the relevant time period, provided a means for including land in a "reserves system," but contained no express limitations on alienation of "system land." *See* Haw. Rev. Stat. §§ 195-3, 195-4(1)-(2) (1985). Standards for alienating "NARS" lands were not enacted until 1987. *See id.* § 195-10 (Supp. 1992). The lands at issue were also subject, during the relevant time frame, to the Geothermal Development Act, which granted the Board power to designate "geothermal resource subzones" in those areas that best show an acceptable balance of seven factors for development of geothermal energy, including "[s]ocial and environmental impacts," Haw. Rev. Stat. § 205-5.2(b)(4) (1985). During the events here, the law required notice of the Board's preliminary findings, and trial-type agency review, with direct review in the Hawaii Supreme Court, of any protests to proposed geothermal development. *Id.* §§ 205-5.1-5.2.

3. In 1985, the Board, with support from the Hawaii legislature, invited the Campbell Estate to exchange certain of its private lands for public lands located in the Kilauea Middle East Rift Zone ("KMERZ"), which included the Wao Kele 'O Puna Natural Reserve. The Campbell Estate lands, located closer to Volcanoes

National Park, could not be as easily developed for geothermal energy due to their close proximity to ongoing volcanic activity, and, in any event, contained pristine Ohia rainforest, sheltering nine threatened or endangered species. By contrast, the lower elevation and ecologically disturbed KMERZ lands were farther removed from Volcanoes National Park and from visible volcanic manifestations of the Hawaiian goddess Pele, which are both culturally and spiritually significant to practitioners of native Hawaiian religion. *See* Haw. Sen. Con. Res. No. 85-30 (Apr. 9, 1985).

4. On September 30, 1985, the State's appraiser issued his report, recommending an exchange provided that an $83,000 shortfall in value to the 5(f) trust could be made up by the Estate. In addition, it was recommended to the Board that any removal of the Wao Kele 'O Puna reserve lands from the NARS be accompanied by creation of a new reserve of similar size on the Campbell lands. This was done. The proposed proprietary boundaries were also modified to equalize the value of the land exchanged, and public notice of the exchange, as required by law, was given prior to execution of the exchange deeds on December 23, 1985. Under its deed, the State retains subsurface rights to the KMERZ parcel, including all rights arising from the land's geothermal potential; the State thus netted clear title to 25,800 acres of geothermal rights, whereas Campbell retained nothing from its original parcel. The lands received from Campbell also had more than 1600 more acres zoned for – and amenable to – profitable agricultural uses than the lands the State traded away. Under state law, moreover, the traditional rights of "native tenants" ran to and burdened the lands transferred by Hawaii to the Estate.

5. Petitioner's privies participated in administrative trial-type hearings over the zoning of this exchanged land during the period in which the legislature considered vetoing the exchange. Permits by which Campbell was authorized to use the lands for geothermal development were granted by the Board on April 11, 1986, only after Palikapu Dedman and Dr. Noa Emmett Aluli, the principal officers of appellant Pele Defense Fund, filed extensive papers opposing the enabling authorizations. In those papers, Pele Defense Fund's principals broadly challenged the grant of authority to the Estate to develop geothermal energy as violative of § 5(f) of the Admission Act, in that "the religious interests of Native Hawaiians will be violated"; "the value of the tracts exchanged are not equal"; "hunting, gathering, and other subsistence rights of Native Hawaiians in the lands conveyed to Campbell Estate will be impaired or lost entirely"; and "the total land area subject to the trust . . . will ultimately be diminished." In its Decision and Order, the Board expressly determined, however, that the Estate was properly "the landowner" of the lands in question, subject only to the Legislature's right to disapproval. *See In re CDUA*, HA 85-1830 (Haw. BLNR Apr. 11, 1986) at 6, 10. On April 23, 1986, the Legislature let the deadline for disapproval pass without action. Shortly thereafter, the Congress approved legislation authorizing transfer of 5,650 acres of the formerly-Campbell land (now in the State) to the United States, in order to consolidate and protect the environmentally sensitive lands in and around the Volcanoes National Park. Pub. L. No. 99-564, 100 Stat. 3179 (1986). In 1987, the state Supreme Court affirmed the permits granted to Campbell, rejecting the claim that title

was wrongly conveyed. *Dedman, supra.* This Court denied review. *See id.*

6. In 1990, the Ninth Circuit affirmed the federal district court's dismissal of Pele Defense Fund's suit seeking to void the exchange pursuant to § 5(f) and various arguments that the exchange violated state law. *Ulaleo, supra.* Applying this Court's decision in *Papasan v. Allain,* 478 U.S. 265 (1986), the Ninth Circuit viewed the complaint in *Ulaleo* as stating that "sometime in the past, the BLNR undertook an action, the land exchange, which allegedly injured the plaintiffs by violating the trust of which the plaintiffs are beneficiaries." 902 F.2d at 1400. Because this essential claim provided "no allegation that the Board is continuing to violate its trust duties in other ways or that it is likely to do so in the future," and as reversal of the exchange "would require the state to purchase the lands from its present holder by way of cash or other land," the court held that the Eleventh Amendment was a bar to suit.

7. In 1992, in this suit, the Supreme Court of Hawaii affirmed the state court companion to *Ulaleo.* Over Respondents' objection that this Court's decision in *Suter v. Artist M.,* 112 S. Ct. 1360 (1992), counseled against reading § 5(f) to be enforceable under the "and laws" language of 42 U.S.C. § 1983, the state court cited with approval to Ninth Circuit decisions that had held to the contrary, and found that "standing" was present for state law purposes. Pet. App. 19a-24a. These rulings were reduced to *dicta,* however, by the Hawaii Supreme Court's conclusions (1) that *Ulaleo* was issue-preclusive, for purposes of determining whether the bar on retrospective relief, applicable in state court under *Will v.*

Michigan, 491 U.S. 58 (1989), was operative (Pet. App. 29a-31a); (2) that preclusive effect also ran to Petitioner's state-law-based causes of action, in that Respondents were sued only in their official capacity, and Hawaii law recognizes the "prospective/retrospective" distinction which forms the basis for this Court's Eleventh Amendment precepts (*id.* at 38a-44a); (4) the exception for "prospective" relief applied independently of *Ulaleo* (*id.* at 43a-45a); and (5) Plaintiffs' federal causes of action, filed on March 10, 1989, nearly three years after the legislature had refused to disturb the land exchange with the Estate, were held independently barred by the two year residual personal injury statute of limitations, Haw. Rev. Stat. § 657-7 (1985), enforceable by 42 U.S.C. § 1988 and *Owens v. Okure*, 488 U.S. 235 (1989) (Pet. App. at 24a-28a). Because the state parties were properly dismissed, relief voiding the exchange could not be had against the private parties (Pet. App. 47a), but Petitioner would be afforded an additional opportunity on remand to demonstrate that the "native tenants" rights adhering under Hawaii law permit at least some of its members "to enter the undeveloped areas of the exchanged lands to exercise their traditional practices" (*id.* at 57a).

REASONS FOR DENYING THE WRIT

The decision of the Hawaii Supreme Court in this fact-bound case presents no issue warranting this Court's further review.

1. Petitioner's claim that the Hawaii Supreme Court improperly "purported to apply state preclusion rules" in

determining the effect of the *Ulaleo* judgment (Pet. at 6) not only misstates the holding below, but does nothing to show even error in the judgment, let alone an error that merits deployment of this Court's resources. While it goes without saying that the preclusive effect of the *Ulaleo* judgment is a federal issue, *see, e.g., Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986), the mere fact that the state court cited several of its own cases on the matter of collateral estoppel shows no disrespect to the federal nature of the issue before it. Indeed, both the Hawaii Supreme Court, and this Court, in reviewing the scope of federal judgments, have relied on the same sources for decades. *In re Bishop Estate*, 36 Haw. 403 (1943), on which the state court expressly relied below, for example, draws its analysis from *Southern Pacific Railroad v. United States*, 168 U.S. 1 (1897). *See* 36 Haw. at 417 (quoting *Southern Pacific*). *Morneau v. Stark Enterprises, Ltd.*, 56 Haw. 420, 539 P.2d 472 (1975), also quoted by the state court below, likewise relies, as has this Court, on Justice Traynor's instructive opinion for the California Supreme Court in *Bernhard v. Bank of America Nationwide Trust and Savings Ass'n.*, 19 Cal. 2d 807, 122 P.2d 892 (1942). *Compare Morneau*, 56 Haw. at 423-24, 539 P.2d at 474-75 (quoting *Berhnard*), *with Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979) (same). Nor can the Hawaii court's mere citation to *Allen v. McCurry*, 449 U.S. 90 (1980), indicate disrespect for federal law. Indeed, the very portion of the *Allen* case cited by the Hawaii Supreme Court itself referred to principles of preclusion law drawn from cases involving federal judgments. *See* 449 U.S. at 95 (citing *Montana v. United States*, 440 U.S.

147, 153 (1978); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971)). There is no disharmony between the judgment below and the "federal interests" underlying federal judgments.

2. Nor, as Petitioner asserts, did the state court misapply federal preclusion law. Although such a mere error would not warrant certiorari in any event, the Hawaii Supreme Court's ruling below fits well within established doctrine which prohibits the relitigation of jurisdictional facts in a later proceeding even "upon a different cause of action." *Parkland Hosiery Co. v. Shore*, 439 U.S. at 326 n.5. It is well-settled "that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.' " *Underwriters Assur. Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691, 706 (1982) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)). Plainly whether the claims asserted in *Ulaleo* sought "retrospective" relief was put in issue and decided in that case adversely to Petitioner, and nothing in the Petition in any way indicates that the claims below were in any material sense different than those in *Ulaleo*. Accordingly, it was wholly proper for the state court to deem both Petitioner's federal and state claims (the latter of which, under rules of law recognized by Hawaii courts for decades, *see* Pet. App. 41a, were properly held to be subject to the same sovereign immunity limitations as set forth in *Ex parte Young*, 209 U.S. 123 (1908)), barred by the unappealed judgment in *Ulaleo*. In *Will v. Michigan*, 491 U.S. 58 (1989), this Court made clear that suits for retrospective relief against state officers sued in their official capacities are not against a "person" for purposes of 42

U.S.C. § 1983. Thus, *Ulaleo* ended the action below. Petitioner's policy arguments urging a different result (*See* Pet. at 9-10) simply take issue with the salutary doctrine of collateral estoppel, a rule that reflects the " '[p]ublic policy . . . that there be an end of litigation,' " and " 'that those who have contested an issue shall be bound by the result of the contest.' " *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). And, because collateral estoppel infects each of Petitioner's claims here, the entirety of the judgment in favor of Respondents is correct, and review should be denied.

3. Even if *Ulaleo* did not exist, however, the same result would obtain. Petitioner does not anywhere demonstrate error even in the Ninth Circuit's determination in *Ulaleo* that the claims seeking to undo the land exchange, either directly or indirectly, were anything but a prayer for "return of the trust corpus itself." *Papasan*, 478 U.S. at 281. Indeed, as Respondents argued below, Petitioner's privies had the opportunity to litigate the legality of the land exchange in the *Dedman* proceeding yet lost on or waived their present issues there. If there was any misapplication of the law of preclusion, it was that by the courts below which did not end this case on the basis of the final decision in *Dedman* nearly six years ago.

4. Petitioner has, in any event, no good argument that the Hawaii Supreme Court wrongly found, independently, that the statute of limitations had run on the federal claims below. Indeed, Petitioner, urging that a State's general "residual statute of limitations" should apply "when a state has multiple personal injury statutes of limitations," Pet. at 11, misstates the holding of *Owens*

v. Okure, 488 U.S. 235 (1988). That case holds that "where the state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for *personal injury* actions." *Id.* at 250. Petitioner, as it did below, wrongly confuses *personal* actions, covered by the six-year statute set forth in Haw. Rev. Stat. § 657-1(4), with *personal injury* actions, which are generally governed by a two-year period. *see* Haw. Rev. Stat. § 657-7 (1985). The lower courts have properly rejected Petitioner's contention as seeking to impose a State's general "catch-all" limitations period when this Court has directed adoption of "the general or residual statute for personal injury actions." *See Del Percio v. Thornsley*, 877 F.2d 785, 786 (9th Cir. 1989); *Perez v. Seevers*, 869 F.2d 425 (9th Cir. 1989). Indeed, the Ninth Circuit is in direct agreement with the Hawaii Supreme Court that the two-year period applies to § 1983 suits. *See Price v. Hawaii*, 939 F.2d 702, 708 n.7 (1991). This case presents no justification for overturning these well-reasoned precedents.

5. Petitioner's reliance on cases from Hawaii allowing suit within six years for legal malpractice, *Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1 (1973), or fraudulent inducement, *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981), is unresponsive to *Owens*, for neither *Higa* nor *Au* were "tort" cases in the strict sense. The cause of action in *Higa* was deemed an "amalgam of both tort and contract," 55 Haw. at 172, 517 P.2d at 5, while *Au* observed it was "ambiguous" whether a claim for fraudulent inducement was a person injury claim at all. *See* 63 Haw. 263, 264 (1981) (on petition for rehearing). Nowhere has the Supreme Court of Hawaii suggested that Haw. Rev. Stat.

§ 657-7 is not the "residual or general personal injury statute." The judgment here therefore does not warrant any further review. This case does not present any situation, as in *Felder v. Casey*, 437 U.S. 131 (1988), where a too-short limitations period is deemed inconsistent with federal policy. Indeed, Petitioner's argument that the two-year statute might not be applicable in state court even when it is the proper statute for claims in the federal courts turns the notion of preemption upside down.

6. Nor is the "accrual" issue identified by Petitioner a proper candidate for certiorari. This issue was not properly raised below, and, in any event is of no merit. As the Ninth Circuit has observed in rejecting similar claims of "ongoing injury," the "passive receipt of [benefits] from an illegal contract" "is not an overt act of enforcement which will restart the statute of limitations." *Eichman v. Fotomat Corp.*, 871 F.2d 784, 794 (9th Cir. 1989). The claims in this case were all ripe at the very latest when the Legislature refused to intervene and stop the land exchange, if not before. *Cf. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 427 n.3 (1987) (claim is ripe even though Legislature has the authority to moot question). The two-year statute had long run when this suit was filed.

7. In addition to the foregoing, the State of Hawaii respondents contend that, under the reasoning of this court's recent decision in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), § 5(f) of the Admission Act is not enforceable under 42 U.S.C. § 1983. Because it is undisputed that § 5(f) does not itself provide for a private right of action, *see Keaukaha I, supra*, the issues raised by Petitioner might well never be reached by this Court, in that it would be this Court's prerogative to affirm, at least with respect to

Pele Defense Fund's federal claim, on the ground that Petitioner has no federal cause of action at all. *Suter* makes quite clear that in cases where federal assets are returned to the States, the creation of "enforceable rights" under § 1983 must be done "unambiguously" in the statute at issue. *See* 112 S. Ct. at 1367. In this context particularly, in which the federal act brings Hawaii into the Union "on an equal footing" with our sister States, it would be doubly surprising if Congress were to be deemed to have created privately enforceable rights. As this Court emphasized in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), when it has come to efforts to burden a State's title to lands conveyed by admission to the Union, "the strong presumption is against finding an intent to defeat the State's title," and, thus, a court "cannot infer that Congress intended to defeat a future State's title" " 'unless the intention was definitely declared or otherwise made very plain.' " *Id.* at 201-02. Here, in contrast to other Admission Acts, Hawaii's Act does not declare transactions in violation thereof to be "null and void." *Cf.* the New Mexico-Arizona Enabling Act, 36 Stat. 557, 574 (1910). Rather, the remedy provided by the act is a suit for appropriate relief by the United States. That remedy, of course, might not itself "foreclose remedies under § 1983," but it does show "that the absence of a remdy to private plaintiffs under § 1983 does not make [§ 5(f)] a dead letter." *Suter*, 112 S. Ct. at 1369. Moreover, it is particularly inappropriate to imply a § 1983 remedy in the circumstances of this case, for every one of Petitioner's "federal" claims depends not on the "one or more" provisions of § 5(f) in a general

sense, but rather on the idea that Hawaii allegedly violated state law which is merely (and as to after-enacted law only arguably) referenced in § 5(f). Even if the idea had merit, "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir. 1984). Here, as in *Suter*, the federal act does no more than require satisfying the United States. *See Suter, supra*, 112 S. Ct. at 1369. Thus, rather than enforcing Congress's intent, implying a § 1983 remedy defeats the discretion vested in the United States *not* to sue.

8. Finally, this case is particularly inappropriate for review here in that Petitioner never presented any evidence below to show that § 5(f) had been violated even on its own theory. Indeed the only issue of state law which the Hawaii Supreme Court found at all substantial was whether the withdrawal of the Wao Kele O' Puna natural area reserve was authorized by state law. *See* Pet. App. 45a. However, that issue is properly resolved by the proposition that "repeals by implication are not favored." *Reefshare, Ltd. v. Nagata*, 70 Haw 93, 97, 762 P.2d 169, 172 (1988). Chapter 195, Haw. Rev. Stat., did not repeal the general discretion to dispose of 5(f) trust lands, conferred elsewhere by Hawaii law, discretion which is contemplated in § 5(f) itself. Indeed, Petitioner's efforts to undo the land exchange would run counter to Pub. L. No. 99-564, which recognized that "[t]he State of Hawaii now holds title to Tract 22 [the lands located near the National Park], having acquired the tract [from Campbell Estate]." H. Rep. No. 99-971, 99th Cong., 2d Sess. (Oct. 7, 1986). Hawaii obviously could not have acquired the Campbell

lands if it did not have authority to exchange the Wao Kele O' Puna reserve. Indeed, Congress's ratification of the exchange quite arguably constitutes a "relax[ation of] the conditions upon which lands had been granted previously [by § 5 of the Admission Act]." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 632 (1989). In light of this fact, it is not at all likely that this Court could even reach Petitioner's issues. *See* Rule 15.1.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Dated: Honolulu, Hawaii, February 2, 1993.

Respectfully submitted,

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS
Deputy Attorney General
Appellate Division
Department of the
Attorney General
State of Hawaiii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

WILLIAM A. TAM*
Deputy Attorney General
Land/Transportation
Division
Department of the
Attorney General
State of Hawaii
465 South King Street
Honolulu, Hawaii 96813
(808) 587-2982
*Counsel of Record

Counsel for Respondents Chairman and Members, Board of Land and Natural Resources, States of Hawaii ("State of Hawaii Respondents")

Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

(3)

No. 92-1112

In The

Supreme Court of the United States

October Term, 1992

PELE DEFENSE FUND,

Petitioner,

vs.

WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES KIRKWOOD KEKAHUNA MEE
Counsel of Record
ASHFORD & WRISTON
1099 Alakea, Suite 1400
Honolulu, Hawaii 96813
(808) 539-0400

Counsel for Respondents The Estate of James Campbell, Deceased, W.H. McVay and P.R. Cassiday, Trustees Under the Will and of the Estate of James Campbell, Deceased, acting in their fiduciary and not in their individual capacities, Herbert C. Cornuelle and F.E. Trotter

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the Hawaii Supreme Court correctly held that claims under 42 U.S.C. § 1983 against state officials acting in their official capacities were barred as seeking retrospective relief, where the claims arose out of a completed land exchange between the state defendants and private parties, and where the federal courts had previously dismissed claims arising out of the same transaction against the same state defendants on the ground that the claims sought impermissible retrospective relief.

Whether Haw. Rev. Stat. § 657-7 (1985), which provides for a two-year statute of limitations for "recovery of compensation for damage or injury to persons or property," is the appropriate statute of limitations to be applied to a § 1983 action filed in Hawaii, where the highest court of the state ruled, in connection with its decision in this case and in light of *Owens v. Okure*, 488 U.S. 235 (1989), that that statute is the general personal injury statute of limitations.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS CERTIORARI SHOULD BE DENIED 8

I. 8

II. 10

III. 10

IV. 11

V. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES:

Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981) 9

Briley v. California, 564 F.2d 849 (9th Cir. 1977) 11

Dedman v. Board of Land & Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988) 2, 3, 4

DeMello v. Home Escrow, Inc., 4. Haw. App. 41, 659 P.2d 759 (1983) 12

Edelman v. Jordan, 415 U.S. 651 (1974) 13

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 2

Food Employees v. Logan Plaza, 391 U.S. 308 (1968) 2

Higa v. Mirikitani, 55 Haw. 167, 517 P.2d 1 (1973) 9

Lee v. Wong, 57 Haw. 137, 552 P.2d 635 (1976) 12

Mahiai v. Suwa, 69 Haw. 349, 742 P.2d 359 (1987) 10

Owens v. Okure, 488 U.S. 235 (1989) 8, 9

Pa. R.R. Co. v. Ill. Brick Co., 297 U.S. 447 (1936) 1

Papasan v. Allain, 478 U.S. 265 (1986) 4, 5, 13

Segal v. Am. Tel. & Tel. Co., 606 F.2d 842 (9th Cir. 1979) 12

Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990) 4, 6, 7, 8, 12

United States v. Kubrick, 444 U.S. 111 (1979) 11

Wilson v. Garcia, 471 U.S. 261 (1985) 8

Yamaguchi v. The Queen's Medical Center, 65 Haw. 84, 648 P.2d 689 (1982) 11

TABLE OF AUTHORITIES – Continued

Page(s)

CONSTITIONAL AUTHORITIES:

UNITED STATES CONSTITUTION, First Amendment..... 3

HAWAII CONSTITUTION, Article I, Section 4..... 3

UNITED STATES STATUTES:

28 U.S.C. § 1257..... 1

42 U.S.C. § 1983.....4, 6, 7, 8, 10

HAWAII ADMISSION ACT, Pub. L. 86-3, 73 Stat. 4 (1959)..... 4

HAWAII STATUTES:

Hawaii Revised Statutes Section 171-50(c) (1985)..... 3

Hawaii Revised Statutes Section 657-7.....7, 8, 9

Hawaii Revised Statutes Section 657-1(4).....8, 9

SUPREME COURT RULES:

Supreme Court Rule 14.1(f)..... 1

Supreme Court Rule 15.2..... 1

HAWAII RULES OF APPELLATE PROCEDURE:

Hawaii Rule of Appellate Procedure 40..... 8

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents The Estate of James Campbell, Deceased, W.H. McVay and P.R. Cassiday, Trustees Under the Will and of the Estate of James Campbell, Deceased, acting in their fiduciary and not in their individual capacities, Herbert C. Cornuelle and F.E. Trotter[1] (singularly and collectively, the "Campbell respondents") respectfully request the Court to deny issuance of the writ of certiorari requested by petitioner.

The petition for writ of certiorari was received by counsel for Campbell respondents on January 4, 1993. This brief in opposition is timely filed pursuant to Supreme Court Rule 15.2.

STATEMENT OF JURISDICTION

As argued in this brief, the Court lacks discretionary jurisdiction to consider petitioner's first and third questions presented, as well as a number of arguments made by petitioner with respect to petitioner's second question presented, in that the questions or arguments were never presented to the Hawaii Supreme Court, and thus are not specially set up or claimed as required by 28 U.S.C. § 1257.[2] *Pa. R.R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 462-63

[1] Mr. Cornuelle and Mr. Trotter are former trustees of the Estate of James Campbell.

[2] Campbell respondents note that petitioner has failed to comply with Supreme Court Rule 14.1(f), which requires petitioner to include in the statement of the case "the stage in the

(1936); *Food Employees v. Logan Plaza*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting).

STATEMENT OF THE CASE

This petition is the latest stage of protracted litigation which has been maintained by petitioner or its privies as part of an attempt to frustrate and stop alternative energy development on the Island of Hawaii. The transaction which is the subject of this suit was previously before this Court by way of a petition for certiorari review in *Dedman v. Board of Land & Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988).

The present suit, like *Dedman*, arises out of a land exchange between the state of Hawaii and Campbell respondents for the purpose of facilitating development of geothermal energy.[3] On December 23, 1985, the state and Campbell respondents exchanged deeds by which Campbell respondents received title to state lands in Puna on the Island of Hawaii, subject to the exchange not being disapproved by the Hawaii legislature. Haw. Rev.

---

proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts." Failure to make such a showing in itself bars presentation of the question. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

[3] A detailed statement of the extensive administrative proceedings and contested case proceedings in 1984 and 1985 which led up to the exchange can be found in the Hawaii Supreme Court's reported opinion in *Dedman*.

Stat. § 171-50(c) (1985). The exchange became final when the legislature failed to disapprove it by April 23, 1986, the last day of the 1986 legislative session.

As part of public hearings and other administrative proceedings connected with the exchange, Ralph Palikapu Dedman ("Dedman"), Dr. Noa Emmett Aluli ("Aluli"), Lehua Lopez ("Lopez") and others initiated a series of four contested case proceedings before the Hawaii state Board of Land and Natural Resources ("BLNR"). During those proceedings they raised state statutory, constitutional and breach of trust claims. *See,* Petition ("Pet."), Appendix ("App.") B, at 64a-67a. Dedman and Aluli appealed BLNR's adverse decision to the Hawaii Supreme Court, alleging on appeal that their religious rights under the first amendment to the United States constitution and under article I, section 4 of the Hawaii constitution would be infringed by the proposed geothermal development, because the development would desecrate the Hawaiian goddess Pele by sapping her of vital heat.[4] The Hawaii Supreme Court, however, held that the proposed development did not substantially burden appellants' religious practices because (1) they had never engaged in religious ceremonies on the land in question, and (2) there was no showing that tapping the heat source would diminish the eruptive nature of the land. *Dedman,* 69 Haw. at 261, 740 P.2d at 32.

---

[4] Some believers assert that Pele, the Hawaiian goddess of volcanoes, lives in the Puna area, and is manifested through volcanic and other phenomena. *Dedman,* 69 Haw. at 259, 740 P.2d at 31.

Dedman and Aluli then filed a petition in this Court for certiorari review of the Hawaii Supreme Court decision. On April 25, 1988, the petition was denied. 485 U.S. 1020.

The same day this Court denied certiorari in *Dedman*, Dedman, Aluli and Lopez, now reconstituted as the petitioner "Pele Defense Fund,"[5] and Kaolelo Lambert John Ulaleo filed a federal civil rights suit under 42 U.S.C. § 1983 in federal district court for the district of Hawaii against BLNR members in their official capacities. Petitioner sought to invalidate the land exchange as violating § 5(f) of the Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959).

Subsequently, anticipating that its federal action would be dismissed, on March 10, 1989 petitioner filed the instant suit in state court. The original state complaint was virtually identical to its federal counterpart.

On July 26, 1989, the federal action was dismissed for want of jurisdiction on grounds of eleventh amendment immunity. On May 4, 1990, the court of appeals affirmed the dismissal. *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990). The Ninth Circuit, relying by analogy upon this Court's prior decision in *Papasan v. Allain*, 478 U.S. 265 (1986), held that petitioner's federal suit sought impermissible retrospective relief. 902 F.2d at 1399. As the Ninth Circuit stated:

> Although *Papasan* is at least superficially different from this case in that its trust corpus ceased to exist completely, what is important is

---

[5] *See* Pet., App. B at 64a.

> the Supreme Court's characterization of the relief sought in the violation of a trust. The complaint is that sometime in the past, the BLNR undertook an action, the land exchange, which allegedly injured the plaintiffs by violating the trust of which the plaintiffs are beneficiaries. There is no allegation that the Board is continuing to violate its trust duties in other ways or that it is likely to do so in the future . . . We hold that to grant the requested relief would be a retrospective remedy, as opposed to stopping an ongoing violation of federal law. If the trust duty was violated, it happened when BLNR executed the exchange. . . .
>
> Plaintiffs' attempt at framing the desired relief as prospective is not persuasive. The Supreme Court's statement in *Papasan* that the trust violation was a past breach coupled with plaintiffs' desire to be *restored* to a prior position supports our conclusion that the district court properly barred suit because of the eleventh amendment.

Id. at 1399-1400 (emphasis in original).

Petitioner did *not* seek certiorari review in this Court of the Ninth Circuit's determination that petitioner sought retrospective relief. Instead, on December 13, 1990, petitioner amended its complaint in state court in the instant case, adding for the first time the Campbell respondents and respondents True Geothermal Drilling Company and Mid-Pacific Geothermal, Incorporated ("True respondents"), who occupied the land pursuant to a lease from the Estate of James Campbell. Although the express request for invalidation of the exchange was dropped, petitioner now requested that a "constructive

trust" be imposed on the land. Pet., App. A at 18a; App. B at 70a.

In contrast to its statement to this Court that it was asserting different § 1983 claims involving different wrongs (*see* Pet. at 9), in its motion for leave to file an amended complaint below petitioner emphasized that all the claims still arose from the same transaction and occurrence, i.e., the land exchange. (*See* Memorandum in Support of Plaintiff's Amended Motion for Leave to File First Amended Complaint for Declaratory and Injunctive Relief, at 8 (Hawaii Supreme Court Record ["R."] 3 at 104)).

A number of defenses were asserted by the state of Hawaii and by the Campbell and True respondents in their answers and subsequent motions to dismiss and for summary judgment, including that the claims were untimely and that principles of *res judicata* and collateral estoppel applied. At no point in responding to respondents' defenses of *res judicata* and collateral estoppel did petitioner argue in the trial court either that federal rather than state preclusion rules should be applied, or that application of federal rules would lead to any different result. Petitioner also did not controvert respondents' assertions of accrual. Pet., App. B at 88a-89a.

On May 20, 1991, the state suit was dismissed in its totality. The trial court, *inter alia*, held that petitioner's claims were collaterally estopped by *Ulaleo's* determination that the claims sought impermissible retrospective relief. Moreover, the trial court indicated it would have come to the same result *independently* even if collateral estoppel principles did not apply, as it was clear that

petitioner's amended complaint sought retroactive relief. Pet., App. B at 75a-78a. The trial court further found that petitioner's claims were untimely, since the claims accrued at the time the land exchange was finalized and were not filed within the two-year time period provided by Haw. Rev. Stat. § 657-7. Pet., App. B at 85a-89a.

In its brief on appeal in the Hawaii Supreme Court petitioner did not challenge the trial court's use of state, rather than federal, preclusion principles. It also did not challenge the trial court's determination that its claims had accrued at the time the land exchange was finalized. (*See* Appellant's Amended Opening Brief in the Hawaii Supreme Court, at 20-21; 33-36; and 44-47.)

The Hawaii Supreme Court affirmed the dismissal of the § 1983 claims. It held that all the claims under § 1983 were subject to the two-year limitations period for injury to persons or property set forth in Haw. Rev. Stat. § 657-7, since that statute was the "general personal injury statute of limitations." Pet., App. A at 25a-29a. The limitations period ran from the date petitioner knew of the land exchange, and had expired. Pet., App. A at 29a.

The Hawaii Supreme Court further held that petitioner's claims were barred by *res judicata* and petitioner was collaterally estopped from raising challenges against the land exchange by virtue of *Ulaleo's* holding that petitioner had sought retrospective relief. Pet., App. A at 29a-31a, 45a-46a. In another section of its opinion the Hawaii Supreme Court also independently concluded on the basis of the record before it that the state's sovereign immunity barred petitioner's state law claims because

they sought impermissible retrospective relief. Pet., App. A at 44a.

Petitioner did not seek reconsideration in the Hawaii Supreme Court. (*See* HAW. R. APP. P 40.)

REASONS CERTIORARI SHOULD BE DENIED

I.

All of the questions presented in the petition are academic if, as the trial court and Hawaii Supreme Court both found, and as the federal district court previously intimated in the federal companion case of *Ulaleo v. Paty*, petitioner's claims were untimely.

In *Owens v. Okure*, 488 U.S. 235 (1989), this Court reaffirmed that "a State's personal injury statute of limitations should be applied to all § 1983 claims." *Id.* at 241. If there is more than one such statute, the Court held that the "residual or general personal injury statute of limitation applies." *Id.* The applicable statute of limitations is a question of state law. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985).

Haw. Rev. Stat. § 657-7 expressly provides that there is a two-year limitations period for actions for the recovery of compensation "for damage or *injury to persons* or property. . . . " (Emphasis added.) Despite the apparently clear language of the statute, petitioner's assertion is that the six-year period of Haw. Rev. Stat. § 657-1(4) for

"[p]ersonal actions of any nature whatsoever not specifically covered by the laws of the State" applies. Petitioner's argument is based solely on petitioner's construction of two prior Hawaii Supreme Court cases, *Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1 (1973), and *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981). Petitioner asserts that these two decisions had determined that Haw. Rev. Stat. § 657-1(4) was the residual statute for personal injury actions.[6]

In its opinion in this action, however, the Hawaii Supreme Court expressly rejected petitioner's interpretation of its prior decisions. The Hawaii Supreme Court pointed out that neither *Higa* nor *Au* were personal injury cases. Pet., App. A at 27a, n.14. It expressly held that Haw. Rev. Stat. § 657-7 is the general personal injury statute. Pet., App. A at 26a-28a.

Petitioner cannot pick and choose which Hawaii Supreme Court decisions are controlling, especially when the Hawaii Supreme Court has expressly held that petitioner's interpretation of its prior decisions is incorrect.

The judicial determination by a state's highest court of what constitutes the correct general limitations period for personal injuries is clearly contemplated and authorized by *Owens*. 488 U.S. at 250 n.12. Thus, there is an

---

[6] Although not explicitly set forth in its petition, petitioner's argument rests on this Court's statement in *Owens* that "a residual statute of limitations would apply where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly *or by judicial construction*, unspecified personal injury actions." 488 U.S. at 250 n.12 (emphasis added).

independent and adequate state ground for the Hawaii Supreme Court's decision, which disposes of the petition.

II.

Petitioner's assertion that a state court should select a state statute of limitations that is different from the state statute a federal court would apply to the identical claim is without merit or authority. The claim is the same claim whether asserted in federal court or state court, and the same limitations period should be applied. In any event, this argument was not made below, was not specially set up or claimed, and should not now be reviewed. *Mahiai v. Suwa*, 69 Haw. 349, 354, 742 P.2d 359, 364 (1987) (issues not raised on appeal are waived).

III.

Petitioner further argues that the Hawaii Supreme Court erred in determining accrual of a § 1983 cause of action by reference to state law. Petitioner never raised this issue on appeal, it was not specially set up or claimed, and it should not now be reviewed. In any event, the very fact that petitioner was arguing for a six-year, rather than a two-year, limitations period, shows petitioner also believed the clock was ticking. Despite petitioner's continued assertion in this Court that the alleged wrong was "ongoing," all of the courts which examined petitioner's claims determined that these claims arose by virtue of the completed land exchange. Finally, both Hawaii and the federal courts apply the "know or should have known" standard for determining

accrual, and petitioner cannot demonstrate that a different result would obtain if the Hawaii Supreme Court had expressly applied the federal accrual rule. *Compare United States v. Kubrick*, 444 U.S. 111 (1979) *and Briley v. California*, 564 F.2d 849, 855 (9th Cir. 1977) *with Yamaguchi v. The Queen's Medical Center*, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982).

IV.

Petitioner states that the Hawaii Supreme Court failed to apply federal preclusion principles, and instead improperly utilized state principles of *res judicata* and collateral estoppel. Petitioner, however, never challenged on appeal the trial court's application of state, rather than federal, preclusion rules. Indeed, in its appeal brief petitioner also analyzed the preclusion issue as one of state, rather than federal, law. Thus the question was not specially set up or claimed and should not now be reviewed.

Petitioner also cannot show that the result would be any different had federal preclusion principles been applied. Campbell respondents agree that a dismissal for lack of jurisdiction is not generally a dismissal on the merits. But where dismissal for lack of jurisdiction rests upon a determination that the relief sought is not available under the statute because of the nature of the claims asserted, any subsequent court considering the matter should come to the same conclusion if the nature of the claims remains the same, and therefore the prior determination should be given preclusive effect. To do otherwise would be to create an anomalous situation where relief expressly determined to be barred by one court is

allowed by the second court. *See, e.g., Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (dismissal for lack of jurisdiction precludes relitigation so long as precondition to jurisdiction remains unsatisfied). If Petitioner had had a problem with the Ninth Circuit's holding in *Ulaleo*, it could have sought certiorari review at that time. It did not do so.

In any event, the federal district court and Ninth Circuit in *Ulaleo*, as well as the trial court and Hawaii Supreme Court in this case, all came to the independent conclusion that petitioner's claims impermissibly sought retrospective relief. In this Court petitioner makes much of the fact that it amended its complaint to delete its request for "nullification" and instead substituted a claim for imposition of "constructive trust" to enjoin state officials "to comply with continuing trust obligations." In reality, however, this change is a distinction without a difference, as Hawaii law provides that a constructive trust is simply an equitable device to compel reconveyance of property wrongfully held. *Lee v. Wong*, 57 Haw. 137, 139-40, 552 P.2d 635, 637-38 (1976); *DeMello v. Home Escrow, Inc.*, 4 Haw. App. 41, 48, 659 P.2d 759, 763-64 (1983). Petitioner's pleadings in the record below are replete with assertions that the land in question could not be legally alienated in the first instance, and that any attempt to do so by the state was void. (*See, e.g.*, petitioner's Memorandum in Support of Motion for Preliminary Injunction in the trial court below, R. 4 at 23 (area "illegally withdrawn" from state natural area reserve system); *id.* at 36 (no provision in state law which allowed state "to dispose or otherwise divest" its lands [sic])).

All four courts which examined petitioner's claims concluded that, however characterized, petitioner's claims are functionally indistinguishable from the breach of trust claims unsuccessfully sought to be asserted in *Papasan v. Allain*, 478 U.S. 265 (1978). As this Court stated in *Papasan:*

> The distinction between a continuing obligation on the part of the trustee and an ongoing liability for past breach of trust is essentially a formal distinction of the sort we rejected in *Edelman* [*v. Jordan*, 415 U.S. 651 (1974)] . . . We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners.

Id. at 280-81.

V.

Finally, petitioner implies that the Hawaii Supreme Court in effect extended to Campbell respondents "a derivative form of Eleventh Amendment immunity." Pet. at 10. Petitioner omits to mention that it never challenged on appeal the trial court's dismissal of Campbell respondents upon determining that the case could not continue in the absence of the state.

As expressly stated by the Hawaii Supreme Court on this issue: "PDF failed to appeal from the lower court's conclusion of law ruling that the State is an indispensable party to the breach of trust claims against Campbell and True. Issues not properly raised on appeal will be deemed to be waived." Pet., App. A at 47a.

CONCLUSION

The Court should decline to exercise certiorari review. The decision of the Hawaii Supreme Court was based upon adequate and independent state grounds. Additionally, this Court lacks jurisdiction to consider the other issues before it, as petitioner failed to present them properly below.

Respectfully submitted,

JAMES KIRKWOOD KEKAHUNA MEE
Counsel of Record
ASHFORD & WRISTON
1099 Alakea, Suite 1400
Honolulu, Hawaii 96813
(808) 539-0400
Counsel for Respondents The Estate of James Campbell, Deceased, W.H. McVay and P.R. Cassiday, Trustees Under the Will and of the Estate of James Campbell, Deceased, acting in their fiduciary and not in their individual capacities, Herbert C. Cornuelle and F.E. Trotter